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In The

Supreme Court of the United States

October Term, 1973

No. 73-1215

FRANK LA COSA, JOSEPH LA COSA, CHARLES CASSARELLA, TIMOTHY SCHRADER, VINCENT YANNI and ANTHONY COLANGELO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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October Term, 1973

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT

Petitioners jointly and severally pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its affirmance of the respective judgments of the United States District Court for the Southern District of New York, convicting each of them of conspiracy to distribute narcotics in violation of 26 U.S.C. Sections 4705(a) and 7237(b) and 21 U.S.C. Section 846; and convicting Joseph LaCosa of engaging in a continuing criminal enterprise in violation of 21 U.S.C. Section 848 as well as a substantive charge of distribution of heroin as against Joseph LaCosa only, in violation of 21 U.S.C. Section 841, after trial before Tyler, J. and a jury.

OPINION BELOW

The opinion of the Second Circuit is reproduced as an appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The Court of Appeals initial decision of affirmance was dated November 23, 1973. A motion for rehearing was timely filed, but denied on the 8th day of January 1974. (See Appendix herein.)

QUESTIONS PRESENTED

1. Whether the pervasive, indiscriminate wiretapping and recording of every human sound, both innocent and suspect, uttered over the telephones subjected to 60 days of continuous wiretapping violated 18 U.S.C. Section 2518(5), (N.Y.)C.P.L. 700.30, and the Fourth Amendment by reason of a complete failure to "minimize" the interceptions?

2. Whether the failure and omission of the original and renewal warrants authorizing the wiretaps to even contain a provision requiring minimization rendered them void and in violation of the federal and state constitutional and statutory requirements which mandate the minimization of the interceptions?

3. Whether the minimization requirements of 18 U.S.C. Section 2518(5) and Section 700.30 C.P.L.(N.Y.) are satisfied by a retrospective determination by the governmental agents who listened to and recorded all of

the conversations, without exception, 24 hours a day for 60 days, as to what conversations were within the purview of the warrant orders?

4. Whether the mere fact that the monitoring agents said they acted in good faith justified the intercepting, overhearing and recording of 1595 calls, 150 of which were possibly relevant, but 27 of which were even offered into evidence at the trial? Were the Courts below justified in holding that retrospective minimization was proper in this case?

5. Since the Government maintained that it is not possible to minimize interceptions, except retrospectively, despite the fact that only 150 of 1595 calls were even remotely relevant, shouldn't this Court hold that the wiretapping statutes are ipso facto unconstitutional as being in conflict with the Fourth Amendment?

6. Whether the statute under which petitioner, Joseph LaCosa, was convicted, namely, a "continuing criminal enterprise" (21 U.S.C. Section 848(b)) for which he received a 30 year sentence and a $100,000 fine, is constitutionally void for vagueness?

7. Whether a "continuing criminal enterprise" should have been charged in view of the fact that it rested on substantially the same proof as the conspiracy count, of which he was also convicted, and thus subjected him to double punishment for the same crime?

8. Whether pretrial publicity as to gangland killings of co-conspirators mentioned in the case, reported in the local press only 10 days before the trial, precluded a fair trial in view of the trial judge's denial of a continuance?

CONSTITUTIONAL AND STATUTORY MATERIAL

The Fourth, Fifth and Sixth Amendments of the United States Constitution as well as 21 U.S.C. Sections 841, 846, 848; 26 U.S.C. Sections 4705(a) and 7237(b); 18 U.S.C. Section 2518(5); Title III of the Omnibus Crime Control and Safe Streets Act; as well as (N.Y.)C.P.L. 700.30 are herein involved. In addition, Section 690.30 C.P.L. etc. are involved.

THE FACTUAL BACKGROUND

The Government claimed that this was a large drug conspiracy of which Joseph LaCosa, a man in his early twenties, was the most visible member.

It is striking to note, however, that despite a pervasive and protracted period of surveillance, both visual and electronic, not one iota of heroin or other prohibited drug was ever found on the person of Joseph LaCosa, or for that matter on the person of any of the other petitioners herein. Moreover, none was ever discovered in their homes or personal effects.

It is therefore a strain upon credulity to brand this conspiracy so pervasive without any tangible evidence of drugs. The so-called co-operating witnesses, the Marble brothers (Horace and William) and Thaddeus Byrd were the sole possessors of narcotics. The evidence revealed however, that they had been in the drug business before ever meeting Joseph LaCosa and that they undoubtedly had independent means for acquiring narcotics.

Thus, it is submitted that there is no justification on the facts adduced at trial to brand this drug conspiracy as

" . . . one of the biggest operations in hard drugs in the New York area . . . " (opinion below, slip 5621).

Of all of the petitioners herein, only Joseph LaCosa is implicated to any degree by evidence *dehors* wiretapping. [1]

The crucial fact which we ask this tribunal to recognize, however, is that *but for* the electronic surveillance there could not have been a conviction against any of the petitioners herein.

Wiretapping was a *sine qua non* to the presentation of both the indictment and the trial. Without the use of such electronic interceptions, no convictions could have occurred.

We therefore ask this Court to focus on the wiretap question in the analysis of the case herein. Frank LaCosa, Joseph LaCosa's father, Vincent Yanni, Timothy Schrader, Charles Cassarella, and Anthony Colangelo could not under any circumstances have been brought into the alleged conspiracy without the wiretaps.

We also direct this Court's attention to the fact that the search warrants executed herein were directly dependent on the wiretaps.

---

1. We inform this Court that a co-appellant, Joseph Manfredi, who was permitted to file a petition for rehearing to the Circuit Court subsequent to that of the petitioners herein, has still not received a decision on that rehearing. We assume that there will be an additional petition for certiorari to this Court irrespective of the way the Circuit Court decides that petition and we therefore prospectively adopt the arguments which may be made on behalf of Manfredi to this Court, so far as relevant to the petitioners herein.

Investigator Crodelle of the State Police testified as follows (53a):

> "Q. . . . Would it be fair to say, therefore, but for the interception of phone conversations you could not have asked for this search warrant? A. That is correct. That would be fair to say." 2

It is submitted by the petitioners herein that irrespective of any other error in the record, the wiretapping requires reversal since both the orders upon which it was based and the execution of those orders by the police, were in violation of both the statutory and constitutional requirements appertaining to this type of electronic surveillance.

Although with respect to some defendants there was evidence *dehors* wiretapping, it is nevertheless submitted that without the wiretaps no indictment could have been obtained nor could the investigation of this case have proceeded to the point where an indictable offense could have been established. In other words, it is the position of the petitioners in this case that notwithstanding any other issue, the wiretaps require a reversal of each judgment of conviction. While we recognize that this is an important case and the crimes charged are very serious, we nevertheless contend that the integrity of the judicial process requires that this Court scrutinize the applications for the wiretap orders, the wiretap orders themselves, and the execution thereof by the authorities. Upon such a

2. Jeremiah O'Leary of the State Police also testified that the wiretaps were used for probable cause to search (T347).

review, we do not doubt that this Court can reach no conclusion other than that the Constitutional and statutory requirements relating to wiretapping were violated not merely incidentally but in the grossest possible sense. It is submitted that there was not even an effort made to give token compliance with the statutory and constitutional requirements appertaining to this type of electronic surveillance.

What occurred in this case was 60 days of continuous wiretapping without any effort to minimize the wiretaps nor to in any way restrict the electronic eavesdropping to conversations which were pertinent to the investigation.

Although the prosecution conceded that there were at least 1595 conversations overheard, there was never any effort made to restrict the eavesdropping to conversations which in some way would relate to this investigation.

What actually occurred, by concession of the Government, was that every single conversation by any human being using those telephones was recorded day and night for a period of 60 days except when reels were changed or when there were technical difficulties with the wiretaps themselves. Nothing was intentionally omitted. Nothing was in any way, shape or form, done to confine the eavesdropping to matters which were pertinent to the investigation of narcotics and narcotics related offenses.

The petitioners herein were the subjects of such a massive electronic surveillance that it can only shock the conscience of this Court.

Since wiretapping has frequently been analogized to search and seizure, we must equate it with the execution of a search warrant. In this regard it is, without question, one of the most flagrant abuses of any Court-ordered electronic interception that this counsel can recall in some 21 years of practice in the criminal field. The authorities arrogated to themselves the right to indiscriminately seize every single human conversation or word articulated over the telephones that were the subject of the Court orders, for a period of 60 days. While one of the agents, Agent White, declared that he believed that many of the conversations related to drugs, only about 23 conversations were introduced into evidence of the 1595 which were seized. It is doubtful, to say the very least, that more than perhaps a dozen other conversations could relate to narcotics. This Court will have an opportunity, if it wishes to review the transcripts of conversations or to listen to the tapes. It is submitted that in doing so there can be no doubt that such a vast amount of material other than drug-related conversations were seized, that there was not even a pretense of compliance with the statutes or the constitution in this case.

The Circuit Court found that of the 1595 intercepted calls, only a very few were relevant.

> "Here there was testimony that 'most' of the 1,595 calls intercepted were deemed to be 'germane' to the narcotics investigation. In all candor, our examination of the logs and

transcription sheets does not lend credit to that testimony."[3]

The Circuit Court therefore treated the testimony of Agent White of The B.N.D.D. as incredible as a matter of law and quite properly so.

The petitioner Joseph LaCosa was also convicted under count two of the indictment which is a virtually brand-new statute charging a "continuing criminal enterprise", under 21 U.S.C. Section 848. It is the position of the petitioner Joseph LaCosa that not only does the proof fail to establish that he violated this statute, but, in addition, the statute itself is unconstitutionally vague and, therefore, that count should be dismissed in any event as regards Joseph LaCosa.

The other issues in this case involve searches and seizures of certain evidence from the homes of Frank and Joseph LaCosa, who share the same household, and Timothy Schrader who lived at 10 Sable Court.

In both instances however, the search warrants upon which these seizures were predicated, were themselves dependent upon the validity of the wiretaps because without the electronic surveillance, no search warrants could have been obtained.

3. For example, the Court's examination of the Sable court transcript sheets revealed that over 800 of the more than 1000 calls placed during the period in question were either designated as "non-pertinent" by the transcriber(s) or were calls to which there was either no answer or a busy signal. Only 150 or so calls were designated to be of possible interest.

Officer Crodelle, of the State Police, who was one of the applicants for these orders, testified as follows (53a):

> "Q. Would it be fair to say that you have no independent knowledge of the presence of narcotics at 11 Daisy Court? A. No, that wouldn't be fair to say.
>
> Q. You had personal knowledge there were narcotics there? A. I interpreted some phone calls.
>
> Q. *That's what I want to get at. Would it be fair to say therefore but for the interception of phone conversations you could not have asked for this search warrant?* A. *That is correct. That would be fair to say.*"

This petition, therefore, will concentrate primarily upon the issue of the wiretapping since it is our contention that once this Court is convinced that the wiretaps were improperly obtained and executed, that all the other issues in the case, of which there are several, will automatically become academic.

The Electronic Surveillance Considered

District Attorney Robert R. Meehan of Rockland County, apparently at the behest of the State Police, applied to a Supreme Court Justice in Orange County, New York, for eavesdropping warrants permitting electronic interception of telephone conversations over telephones located at 10 Sable Court, West Nyack, New York, and 11 Daisy Court, Nanuet, New York.

District Attorney Meehan apparently did not appear before Justice Sweeney who issued the orders permitting the electronic surveillance. The applications were predicated upon affidavits of Special Agent Francis A. White of the Bureau of Narcotics and Dangerous Drugs and Investigator Robert Crodelle of the New York State Police.

The order granted by Justice John W. Sweeney, *inter alia*, provided the following and was dated September 14, 1971:

> "This order shall be effective for a thirty (30) day period commencing on the 16th day of September, 1971 and that execution shall be made as soon as practicable thereafter, and that the interception of conversations shall be for twenty-four (24) hours a day, up to and including the 15th day of October, 1971."

According to the testimony at trial, on the 16th of September, 1971, there were electronic apparatuses installed at Nanuet, New York, to overhear conversations and on the 17th of September, 1971, similar appliances were installed in West Nyack, New York.

It is very significant to note that both of these electronic listening posts were staffed by human beings at all times and, therefore, there was no doubt but that selectivity and minimization could have been made since the officers who were always present could have determined by listening to what was coming in, whether or not the voices referred to persons named in the Court orders or whether the contents of the conversations related

to matters pertaining to the investigation. This, of course, was not done.

On October 14, 1971, District Attorney Robert R. Meehan again made an application to the Supreme Court of the State of New York in Orange County for a renewal of the eavesdropping warrant upon the homes of the respective defendants in Nanuet, New York, and West Nyack, New York. The order was issued on October 15, 1971, by Justice Sweeney and was effective until the 14th day of November, 1971. Thereafter the district attorney applied for, and was granted permission, to delay notification of the existence of the wiretaps, so far as the subjects were concerned, until May 14, 1972.

There was no effort whatsoever made, as we have already stated, to minimize or restrict the wiretapping.

During the examination of Special Agent Francis White who was in charge of the investigation on behalf of the Bureau of Narcotics and Dangerous Drugs, the following colloquy appeared (25a):

> "Q. . . . Now, did you at any time instruct these monitoring agents that they were required and authorized to listen only to conversations referring to narcotics? A. No, sir, I did not.
>
> Q. Did you tell them at any time that if a conversation did not appear to refer to narcotics they were not to intercept it and listen to it? A. No, sir, I did not.

> Q. Did you tell them that they were to turn off the machine, not to listen to conversations unless it pertained in some form . . . I'm not saying perhaps in every respect . . . but in some form to the subject matter of the investigation? A. No, sir."

Agent White declared that in his opinion although there were many persons who used the telephones at the aforementioned addresses, including wives and children and relatives, a number of whom were not mentioned in the indictment and many of whom were not mentioned in the Court orders, that notwithstanding that fact, all of the conversations in his opinion pertained to narcotics.

It is, of course, needless to say that Agent White admitted he had not listened to all of the conversations and that actually a perusal of the conversations will reveal that most of them did not relate to narcotics or narcotic related matters. There can be no doubt that Agent White was completely inaccurate in his testimony.

A further colloquy during the cross-examination of Agent White revealed that the instructions of the officers were to record everything, irrespective of what came in over the tapes and irrespective of whether or not they involved people who were named in the orders or otherwise.

The following colloquy also occurred during the cross-examination of Agent White (31a):

> "Q. Were there any conversations other than the names that I listed: Joey [La Cosa] and Joseph Manfredi? A. Yes, sir, there were.

Q. Who else were they? A. The other defendants that are in the courtroom.

Q. Were there people besides the other defendants? Anybody else use that phone? A. Yes, sir.

Q. Not involving these individuals at all, were there conversations that were conducted by other persons not mentioned in this order at all? A. Yes, sir.

Q. And those conversations were listed and recorded too, isn't that so? A. That's correct, sir."

In other words, Agent White wanted the Court to believe that although he himself only listened to about a hundred conversations (31a), that all 1595 conversations that were recorded over the 60 day period related to narcotics. Actually, despite the fact that there were families and relatives residing in the two houses in question, Agent White wanted the Court to believe that *never* was there a conversation that came over those telephones that did not relate to narcotics.

A perusal of the logs and just a listening to the conversations of any day whatsoever will reveal that this testimony is so far from what occurred and deviates from the truth in such a material matter, that it can only be listed as a sheer nonsense. It is impossible to believe that Agent White was serious in his testimony. If he was serious, then it would automatically disqualify him to ever

investigate a narcotics case again since the conversations for the most part did not refer to narcotics.[4]

Finally, Special Agent White testified at trial during the motion to suppress the wiretaps, as follows (34a):

> "Q. I am not talking about that. Were they ever instructed when a conversation comes in that is not within the purview of this order you are to turn off the machine and not listen? A. Not by me, no, sir.
>
> Q. Is it not a fact that your instructions were to the contrary, that they were to *listen to all conversations?* A. It would resemble that, yes, sir.
>
> Q. Did it? A. In part, yes, sir.
>
> Q. In form or in substance wasn't that your instructions? A. I couldn't get into the form or substance; but they were told to listen to the conversations as they came in and do the best they could to record these conversations.
>
> Q. Every single conversation? A. As they came in, yes, sir."

The order of Judge Sweeney, *inter alia*, provided the following so far as the interceptions were concerned:

4. The Circuit Court disbelieved this also.

> "Ordered that District Attorney Robert Meehan or duly authorized agents or employees of the District Attorney's office of Rockland and/or members of the New York State Police be, and they hereby are authorized and empowered, pursuant to Article 700 of the Criminal Procedure Law of the State of New York and Chapter 119 of the United States Code, to intercept, eavesdrop, listen to and make recordings of conversations between Joey and Joseph Manfredi between themselves and with others in 11 Daisy Court, Nanuet, New York, specifically those conversations between the aforementioned individuals and together with persons known and unknown concerning Penal Law violations pertaining to crimes of criminally selling a dangerous drug in the first degree, criminal possession of a dangerous drug in the first degree and conspiracy to commit violations of the aforesaid sections of law."

The foregoing is part of the order authorizing the interception.

It should be noted that when the interceptions were made that that portion of the order was totally ignored and all conversations were recorded irrespective of who the parties to the conversations may have been and irrespective as to what the subject matter of a conversation may have been.

The Search Warrants

We shall deal only very briefly with the search warrants since we have already pointed out that these warrants were necessarily predicated upon the wiretaps, which had been obtained pursuant to Court order. In other words, if the wiretaps were bad the search warrants must automatically be deemed improper as well.

Investigator Crodelle of the State Police testified as follows (53a):

> "Q. . . . Would it be fair to say, therefore, but for the interception of phone conversations you could not have asked for this search warrant? A. That is correct. That would be fair to say."[5]

Crodelle further testified that it was he who made an application for a search warrant on the 17th of February, 1972. There was no execution of that search warrant for some unknown reason.

Under state law, the period during which a search warrant can be executed is for ten days following its issuance. Since the first one was issued on the 17th of February, 1972, by the 27th of February, 1972, that warrant automatically was void unless it had been executed within that period of time.

Notwithstanding that fact, on the 9th of March, 1972, without Crodelle being present at all, another application

5. Jeremiah O'Leary of the State Police also testified that the wiretaps were used for probable cause to search (T347).

was made for a search warrant predicated upon the prior affidavit of Crodelle and without any apparent explanation of why the first warrant was not issued. The information now was stale so far as search warrants are concerned and no additional information was given to the Judge. Notwithstanding that fact and despite the absence of Crodelle before the issuing magistrate, another search warrant was issued on the 9th of March, 1972 (37a-41a).

Crodelle acknowledged that he had not been present.

Investigator Crodelle further declared that of course he had never been examined under oath following the expiration of the first warrant (39a).

The following colloquy occurred at the trial (39a):

> "Q. Based upon your application was another search warrant issued? A. *Apparently so. I was not present. I have been shown a copy of it and I see the Judge's signature.*
>
> Q. Apparently so? A. Right.
>
> Q. You were never examined under oath following the expiration of the ten day period were you? A. No, sir, that is correct. I was not.
>
> Q. You never renewed or gave any additional information, did you? A. No, sir, that is correct. I did not.
>
> Q. As a matter of fact, you don't know specifically what was said at the time that was

issued, isn't that so? A. Talking about the second?

Q. The second one. A. I want to be absolutely clear before I answer. As to the second warrant, no, sir, I was not present."

The statute upon which the search warrant was issued was a New York State statute, particularly Article 690 of the Criminal Procedure Law. Under that Article, namely Section 690.30 of the CPL, the statute declares, *inter alia*:

"690.30 1) A search warrant must be executed not more than ten days after the date of issuance and it must thereafter be returned to the court without unnecessary delay."

In this case the search warrant of February 17th obviously was not executed within ten days. The inescapable conclusion therefore is that a new application had to be made. Not merely a rehash of the old one. For example, an affidavit to execute a search warrant must obviously be made pursuant to the terms of Section 690.35, Subdivision 2(c) of that section declaring as follows:

"(c) Allegations of facts supporting such statements. Such allegations of fact may be based upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The applicant may also submit depositions of other persons

containing allegations of fact supporting or tending to support those contained in the application . . . ".

Detective or Investigator Crodelle did not appear before the magistrate within ten days of the execution of the initial warrant which had expired on the 27th of February. By the 9th of March, 1972, way over ten days had elapsed and, consequently, a completely new warrant had to be obtained. This meant that there had to be an application presented to the issuing magistrate upon information of a *current* nature. [6] There is no doubt that the ten day period for execution is required since factors may change within ten days which would preclude the necessity for a search warrant. The search warrant herein therefore is totally void and consequently, for that reason too, irrespective of its predication upon the eavesdropping warrant and eavesdropping information, it should be suppressed.

In the case of *In re McDonald*, 263 App. Div. 967, 33 N.Y.S.2d 197 (1942), the Court held that once a warrant had expired without having been executed, it became void. This is the situation in the case at bar.

A word should also be said concerning the manner in which the search was conducted, particularly at 11 Daisy Court. The police, accompanied by members of the Bureau of Narcotics and Dangerous Drugs, executed the warrant at

6. Probable cause at *time of the application* must exist. No new information was given to the magistrate. The information was stale. *(Riggin v. Virginia*, 384 U.S. 152; *Dumbra v. United States*, 268 U.S. 435, 441).

a time when none of the occupants of the home were present. The officers reportedly found some guns and some papers, a notebook and an address book. The papers which contained certain numbers on them such as large amounts of money — $19,000, $16,000, and so forth, as well as the address book which contained the names of some of the defendants in the case were deemed to be very material evidence.

The return, however, which was made by the police, never mentioned anything about the notebook or the address book or the papers. It is submitted that the omission to have mentioned this rendered those items suppressable. Indeed there is serious question as to whether or not they were found at the time of the search (T1593).

Exhibit 5-E introduced by the Government was an address book which is an example of the item which we are referring to.

The petitioner, Joseph LaCosa and the petitioner, Frank LaCosa shared residency at 11 Daisy Court. The police declared that they assumed that the address book belonged to Joseph LaCosa, as did certain papers, because these items were found in a room wherein Joseph LaCosa's clothes were hanging. The house, of course, contained four bedrooms.

A scale which could be used for many, many purposes, possibly one of which would be to weigh narcotics, was found in a room which police believed was occupied by Frank LaCosa and consequently they assumed that scale belonged to Frank LaCosa.

The testimony of Agent Siegel revealed no evidence of any connection between the evidence and the persons against whom it was received (T1666-9, 1671, 1674, 1695-96).

Vehement objections of course were taken since there was no evidence whatsoever that these items were owned by either Joseph LaCosa or Frank LaCosa, as the case may be. So far as the address book is concerned, there was no handwriting analysis made and no fingerprint analysis. Joseph LaCosa's name did not appear on the address book or on the notebook or any of the papers that were found. On top of this, since no return had been made with respect to this property, it is submitted that the search was wholly unwarranted and even more improper was the Trial Court's determination that he would admit this evidence as against Joseph LaCosa in the case of everything but the scale, and as against Frank LaCosa with respect to the scale. This was highly prejudicial and irrespective of the wiretaps requires suppression and reversal.

It should be noted that the making of a return is extremely important.

Under Section 690.50, Subdivision 5 of the Criminal Procedure Law, a return following a search is mandatory. This is true federally as well (Rule 41(d), F.R. Crim. P.).

In *People v. Fusaro*, 53 Misc.2d 510, 279 N.Y.S.2d 126 (1967), the Court held that the provision of the code were mandatory with respect to receipts and inventories and where there was compliance, the inventory could not

be altered or varied or in any way be different, and therefore items included in the inventory return, which were different from items receipted for at the time of the defendant's arrest, could not be used against the defendant in a criminal prosecution.

It has also been held that where State Police officers obtained a search warrant without appearing before the issuing magistrate for examination, then failed to bring the property found promptly before the Judge, and failed to make a return forthwith along with a written inventory of the property actually taken; the irregularities and variations in the procedure were substantial and affected the very essence of the warrants involved so that the search and seizure might be declared illegal and void. In the case at bar it should be noted that although some property was taken, the address book, the notebook, and important items of that sort were never declared in the inventory and consequently no return was made with respect thereto. The highest Court of New York has declared that therefore the search and seizure are illegal and void (*People v. Ricken*, 49 Misc.2d 677, 268 N.Y.S.2d 677 (1966), aff'd, 29 App. Div. 2d 192; aff'd, 27 N.Y.2d 923, 318 N.Y.S. 2d 142).

It need not be substantially argued because the point is so obvious that in New York State where these warrants were issued and executed, the rule of *People v. Defore*, 242 N.Y. 13, is no longer the law. That rule had declared that evidence seized in any manner could be used despite the fact that the constable may have blundered. Obviously now, under the case of *Mapp v. Ohio*, 367 U.S. 643, evidence obtained in violation of the Fourth Amendment must be suppressed.

There is no doubt that this rule obtains not only to the evidence actually seized but to the fruits of that evidence as well.

In *People v. Rodriguez*, 11 N.Y.2d 279, 286, the Court of Appeals explained:

> "And, obviously, it matters not that these 'fruits' happen to be confessions rather than some other type of evidence."

In *Nardone v. United States*, 308 U.S. 338 (1939), this Court held that the fruits of illegal electronic surveillance must also be suppressed. The rule is therefore the same in both the state of New York and under federal procedures.

We have already referred to the fact that a search warrant must be executed within ten days after issuance, otherwise it becomes totally void. A new search warrant complying with all the provisions of Article 690 would then have to be sought and obtained if possible. This did not occur in the case at bar since the old affidavit of Investigator Crodelle which had been used for the February 18th warrant was used again without any updating and without any additional information for the March 9th warrant. (*Riggin v. Virginia, supra; Dumbra v. United States, supra).*

With respect to the electronic wiretapping and surveillance, we wish to merely call this Court's attention to Section 700.30 of the Criminal Procedure Law, Subdivisions 4 and 7 thereof which provide as follows:

> "... 4. A particular description of the type of communications sought to be intercepted and a statement of the particular designated offense to which it relates; and ...
>
> 7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days .... "

The federal statute permitting wire interceptions (18 U.S.C. Section 2518) contains similar provisions. Subdivision (5) of 18 U.S.C. Section 2518 declares as follows:

> "No order entered upon this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the

> authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to *minimize* the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

It should be noted that Subdivision (4) of 18 U.S.C. Section 2518 specifically declares that the request for wire interception must contain a particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates (18 U.S.C. Section 2518 (4)(c).)

ARGUMENT

POINT I

The constitutional and statutory provisions upon which the Government relies to justify wiretapping have never been directly approved by this Court and at this time is a question of first impression. While petitioners maintain that wiretapping is ipso facto violative of the Fourth Amendment, this Court need not even reach that issue, since the failure to minimize the interceptions and the dearth of a valid warrant authorizing eavesdropping would require voiding the convictions in any event.

The facts are uncontradicted that the Government, by dint of a state wiretap order, intercepted, recorded and monitored the subject telephones at Sable Court and Daisy Court without interruption for 60 days, 24 hours a day, except for changing reels or mechanical problems.

The Court below determined that only a small fraction of the calls intercepted was even remotely related to the investigation. Of the 1595 intercepted calls, only 150 were conceivably germane, and of those only 27 were offered into evidence, of which 24 were received (opinion below, slip 5601).

The statutes involved, 18 U.S.C. Section 2518(5)(7) and (N.Y.) C.P.L. 700.30 mandate "minimization" of interceptions.

The state court orders signed by Justice Sweeney do not mention minimization and a literal reading actually reveals that the officers manning the taps were required to continue the surveillance for the term of the orders. There was no provision for judicial review at periodic times to determine the progress and continued necessity for interceptions (cf. *United States v. Bynum*, 475 F.2d 832 (2d Cir. 1973). Instead, the taps were incessant and continuous without reference to pertinency or propriety.

Since wiretapping, being in the realm of the Fourth Amendment, is *prima facie* an invasion of privacy, (*Katz v. United States, supra; Lee v. Florida, supra and Berger v. New York, supra),* it can only be sustained if it conforms to the *strictissimi juris* requirements of the warrant requirements of the Fourth Amendment.

It being beyond dispute that no provision for minimization was contained in the wiretap orders and that there was consistent surveillance without interruption for 60 days, except for technical problems, we turn to the argument of the Government that it is not feasible to minimize interceptions in the wiretap field.

The Government made the extraordinary argument that interception of telephonic communications must be total and pervasive and minimization may only be achieved by retrospectively reviewing all calls thus overheard and recorded, and then selecting those few that are germane.

In other words, a massive, indiscriminate search and seizure cannot be sustained under any circumstances (*Kremen v. United States*, 353 U.S. 347 and *Van Cleef v. New Jersey*, 395 U.S. 814).

The fact that in retrospect, after a total seizure of everything possible to intercept, the Government wants to use about three per cent of what was seized, does render the massive seizure lawful. An unreasonable search and seizure is not made lawful by what a portion of it may retrospectively disclose. (*Byers v. United States*, 273 U.S. 28, 29 and *United States v. Rivera*, 321 F.2d 704 (2d Cir. 1963). Stated another way, a search, unlawful in its inception, is not made lawful by what is ultimately disclosed thereby.

We would also point out that the wiretapping was conducted exclusively by federal narcotics agents, although the warrants were applied for and issued by and to state authorities, authorizing state personnel to surveil.

A State Police investigator, John Crodelle, submitted an affidavit as we have already revealed, *supra*, which was the predicate for the warrants authorizing the taps.

The Circuit Court selectively excerpted from Crodelle's affidavit for the first eavesdropping warrant his desire to restrict the interceptions. The tribunal below ignored the

later affidavit of this officer that in any event, all conversations had to be recorded and that there would be an examination thereof subsequently, and in retrospect there would be winnowed out those conversations which may prove useful.

While that Court has indicated that there was no minimization whatsoever on the one hand, it later declared that because a state officer, Crodelle, told a state justice (Justice Sweeney) that he would endeavor to limit the interceptions to pertinent ones, that this constituted compliance with the statutory prerequisites for minimization.

In Slip Opinion 5599, that Court quotes Crodelle's affidavit as saying:

> "Your deponent recognized that not all of the conversations occurring over the subject telephones will pertain to the said narcotics violations, and accordingly your deponent agrees to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations."

That Court quoted from the original Crodelle affidavit in support of the application for an eavesdropping order. We submit that this was equivocal at best.

The renewal affidavit, however, permitting another 30 days of wiretapping, was apparently not considered by that Court because there, Investigator Crodelle makes it abundantly clear that *all conversations will be recorded*

and reviewed. There, (affidavit of October 14, 1971), Crodelle declared:

> "That *all of the conversation received* will be mechanically recorded and returned to the Court. Although it is requested by your deponent that only required conversation concerning the aforesaid offenses against the Penal Law be recorded, *it is mechanically impossible to exclude other conversations,* that your deponent agrees *to review all recording* by the Court and agrees that the Court restrict the seizures of conversations of those concerning the aforesaid offenses against the Penal Law."

From the foregoing it is obvious that all of the conversations were going to be recorded and reviewed by a human being and only then, retrospectively, would a determination be made as to what the officers chose to use.

That Court did not consider this renewal affidavit and since at least 30 days of wiretapping was based on it, coupled with the fact that it clarifies Crodelle's other affidavit for the original wiretapping, we submit that the Court's determination that there was a promise of minimization is untenable.

In view of the fact that neither Crodelle, nor any other state official participated in the eavesdropping, it is impossible to comprehend how Crodelle's affidavit could be of any significance under any circumstances. Crodelle did not apply to Judge Sweeney on the original wiretap

warrant which the jurist seems to have signed *pro forma* since there is not even a pretense at compliance with the statute. He merely supported an application by District Attorney Robert Meehan.

Of about 1595 conversations that were seized, 27 were deemed relevant for the purpose of trial and of those, 24 were admitted. The Circuit Court was not so naive as to believe Agent White, who declared fatuously that almost all of the conversations were relevant to the investigation. As a matter of fact, the Trial Court below itself found that no more than about 10% of the conversations were even remotely relevant and probably far fewer than those.

Notwithstanding the fact that Crodelle had said that he would make an effort to limit the interceptions, in the light of the lower court's recognition that none of the calls were monitored by state agents, but solely by special agents of the Bureau of Narcotics and Dangerous Drugs, coupled with the fact that admittedly the instructions of these agents were that every human sound was to be listened to and recorded, we do not see how that Court came to the conclusion that there was compliance with the minimization standard. *The renewal affidavit of Crodelle declares that all conversations are to be recorded and reviewed* (October 14, 1971 affidavit).

At Slip Opinion 5600, that Court recognized that the agents of the Bureau of Narcotics and Dangerous Drugs took eight-hour shifts during the 60 day period of telephonic interception and not only recorded, but actually listened to and made logs of every conversation that came over these telephones. Crodelle did not

participate in the electronic surveillance. There was never any question but that no effort to minimize was ever made.

As a matter of fact, the orders of Justice Sweeney did not contain provision for minimization at all. By referring to two lower court state cases, the Circuit Court, for some reason, believes that minimization nevertheless took place. A review of the opinion of that Court, frankly, leaves the reader without any foundation whatsoever for the conclusion that that Court reached. We urge that the Court unquestionably was in error when it came to the paradoxical conclusion that there was "minimization." The only inference one can draw is that that Court has now, by judicial legislation, eliminated the need for minimization from state and federal statutes. Any other interpretation is inconsistent with the ultimate determination of that tribunal.

We realize that this is a drug conspiracy case and, as such, one recoils from the enormity of the crimes alleged. If, however, different standards are to be applied because of crimes charged, then, of course, there is no rule of law but merely *ad hoc* determinations of law depending upon what the charges in a respective case may be. We do not believe that the Court intended to so traduce fundamental principles of due process and we cannot comprehend how the determination of minimization could have been made when not only wasn't it required by the court orders, but by the very admissions of the agents involved, it was not practiced.

To quote the Crodelle affidavit in support of the conclusion that minimization was effectuated by virtue of

his self-serving statement is almost absurd, because we know that Crodelle had absolutely nothing to do with the electronic surveillance and, as a matter of fact, only narcotics agents of the federal government conducted the wiretapping. To then ignore his renewal affidavit revealing that *all* conversations were to be recorded, is incomprehensible.

United States v. Bynum, 475 F.2d 832 (2d Cir. 1973) was cited as authority for the Circuit Court's holding herein. But in *Bynum* the Court found that there was minimization and that moreover, there was close scrutiny of the tapping by a federal judge at periodic intervals, *i.e.* five days.

This Court's opinion in *Gelbard v. United States*, 408 U.S. 41 indicates that there must be strict compliance with the statutory requirements of the statutes authorizing wiretapping. This case was cited to the Circuit Court which did not even mention it in its opinions, thus revealing its inability to distinguish *Gelbard* or that it overlooked it.

In *United States v. Tortorello*, 480 F.2d 764 (2d Cir. 1973), cert. denied, 42 U.S.L.W. 3181 (Oct. 9, 1973), the constitutionality of the statute was considered adversely to the defendants. There is now pending *sub judice* in this Court, *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), cert. granted, 411 U.S. 905 (1973). We have stated, however, that in the case at bar, we believe that the statute is unconstitutional. But even if it were not, the dearth of a valid eavesdropping warrant and the omission to minimize would void the convictions in any event.

The Circuit Court considered the question of the validity of the wiretaps as a question of state law (slip 5610). It recognized however, that C.P.L. 300.30.7 mandates that "minimization" be practiced and that the state court omitted this from the warrants. Nor was there a *de facto* compliance since the interception was indiscriminate and ubiquitous.

To read the first Crodelle affidavit as an "agreement" to minimize is incomprehensible (see slip opinion below 5611), since Crodelle did not make the application, but merely submitted a supporting affidavit. District Attorney Meehan of Rockland County was the only person who could have secured the wiretap orders, but he never appeared before Judge Sweeney and if there had been any "agreement", it would necessarily have to have been made with District Attorney Meehan!

In *United States v. Tortorello*, 480 F.2d at 781, that Court declared that "a common sense and realistic fashion" must be used in reading orders supported by affidavits authorizing wiretapping.

If "common sense" is to be applied in the case at bar, then the only logical conclusion is that minimization was observed in the breach and not at all in the fact. If there was any minimization at all, it was by virtue of a breakdown of equipment which occurred, through no fault of the surveilling agents, for a brief period of time.

In reading and re-reading the opinion of the Circuit Court in the instant case, it is absolutely amazing that it could have come to a conclusion that the statutory

requirements for "minimization" were in fact observed when, by its own observations throughout the opinion, the contrary is evident. Crodelle's October 14th renewal affidavit admits minimization was not practiced.

If it is "impossible" to minimize, as Crodelle suggested, then it is impossible to wiretap! The statutes mandate minimization and should be rewritten if the legislature wishes, but must be obeyed meanwhile.

The nature of the interception was such that the entire case depends upon wiretapping. While it is true that certain observations *dehors* wiretapping were made by federal agents who were surveilling Joseph LaCosa, it nonetheless is evident that the leads they obtained were secured by wiretapping (*Nardone v. United States*, 308 U.S, 388 (1939)).

At page 34a of the record herein, Special Agent White of the B.N.D.D. specifically testified that his agents were directed to listen to all conversations as they came in and nothing whatsoever was said about minimization.

Manifestly, the B.N.D.D. agents must have known that a federal court would never permit such unrestricted surveillance, so it seems they hoodwinked a state justice to indirectly grant a wiretap order, which no federal judge would have signed.

In the instant case there was a state court order which did *not contain* a provision for minimization, and there was *no review by any state court judge* except on the one occasion when a renewal of the order was requested. No state official was in constant surveillance of the electronic

equipment and, as a matter of fact, although District Attorney Meehan obtained the court orders, it is clear that the federal agents took over the operation and obtained whatever they wished on a so-called "silver platter" (*Elkins v. United States*, 364 U.S. 206).

In *Berger v. New York*, 388 U.S. 41, the Supreme Court finally adopted and recognized the verity of the dissent of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485. There, the Supreme Court recognized that wiretapping was "dirty business" to begin with and that unless strict safeguards were employed, there would be no privacy and no observation of civil rights.

We must remember that unless strict compliance with federal and state statutes is observed, 47 U.S.C. Section 605 makes it a crime to intercept a telephone conversation.

The passage quoted in *Olmstead v. United States*, and approved in *Berger v. New York*, *supra*, is as follows (277 U.S. at 485):

> "Decency, security, and liberty alike demand that government officals shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites

> every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible detribution. *Against that pernicious doctrine this court should resolutely set its face.*"

We should also note that *Katz v. United States*, 389 U.S. 347 (1967), also guarantees the privacy of a telephone conversation unless there is strict compliance with federal and state law.

The utilization of a defective order is the same as no order at all.

We are aware, of course, that one recoils from the mention of trafficking in narcotics and that this country necessarily must strictly enforce violations of narcotics laws.

We trust, however, that the enforcement of laws must be in accordance with constitutional and statutory principles. The system of law and order cannot tolerate different standards for the enforcement of criminal laws depending upon the nature of the crime involved. We are concerned that the opinion of this Court in the case at bar will be a signal to lower courts that they may enforce narcotics laws in a manner differently than the laws appertaining to other crimes.

In other words, it is apparent from the facts in the case at bar that no matter how one interprets them, there was

no effort to minimize and, in fact, there was no directive in the court order to minimize. Whatever the state court cases may have said, the case at bar presents such a blatant violation of the requirements of minimization that one cannot fathom a more outrageous deflection from the rule of law specified in the statutes of both federal and state governments.

Whatever interpretation is given to the Crodelle affidavit, it certainly cannot be deemed to have been recognized as binding upon the federal agents who actually conducted the surveillance. As a matter of fact, Crodelle had little to do with the surveillance. His October 14th affidavit admits there was a full recording of *all* conversations!

The actual monitoring of the conversations were exclusively by the federal government, and it would seem that there was a fraud perpetrated upon the good Judge Sweeney who signed the order for interception, certainly based upon the supposition that state agents would be conducting it.

The *droit administratif* which the federal government usurped in the case at bar, is an outrageous example of riding roughshod over the rights of suspects. No one can sympathize with the drug trafficker. Nor can one sympathize with a person who violates the law. By the same token, one necessarily must be concerned about the enforcement of laws in a manner different than the legislatures of both the state and federal governments have directed.

If "minimization" was observed herein, then we submit, as we have heretofore, that minimization is no longer a requirement of the statute. We do not believe that the federal government or the state government could possibly have minimized the interceptions in the manner in which the surveillance was conducted herein. The conclusion by this Court finding minimizations are, frankly, completely at war with the facts of the case.

The lower court, no doubt, was concerned about the alleged enormity of the narcotics violations charged in the indictment.

We are fearful that this factor may have had some influence, certainly subconsciously, in the interpretation of the facts of the case.

We do not believe that there is any basis whatsoever for the interpretation placed upon the facts in this case by this Court.

Does the mere articulation by a state officer that he intends to minimize, mean that the statement of intent itself complies with the statute even though in practice nothing is done to implement it? The question, of course, answers itself.

In the final analysis, what the Court below has done is to completely rewrite the wiretap statutes in both the state and federal jurisdictions.

The obtaining of convictions have sometimes been exemplified by reprehensible and illegal methods. The Supreme Court has called this a pollution of the law and

that the dignity of the United States Government will not permit convictions based upon such evidence (*Mesarosh v. United States*, 352 U.S. 1, 9, 14; *Wong Sun v. United States*, 371 U.S. 471; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385).

In *Coolidge v. New Hampshire*, 403 U.S. 443, quoting with approval the language of *Boyd v. United States*, 116 U.S. 616 at 635, the Supreme Court warned against deviations that caused an erosion of constitutional and statutory rights. There the Supreme Court explained:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; *but illegitimate and unconstitutional practices, get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure.* This can only be obviated by adhering to the rule that constitutional provisions . . . should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it *consisted more in sound than in substance.* It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon" (emphasis ours).

In I Cooley, Constitution Limitations, (8th Ed.), Section 646, this famous author declares:

> "In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them

> immense power for oppression; and it is to be feared that they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused . . . ."

In *Miranda v. Arizona*, 384 U.S. 436 and *Mapp v. Ohio*, 367 U.S. 643, the Supreme Court also indicated that the law must be obeyed and irrespective of whether or not the prisoner goes free, it is the law that must be obeyed and not the determination of the nature of the crime that must be inquired into.

In *Mapp v. Ohio*, for example, the Supreme Court declared (367 U.S. at 659):

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

In *Lee v. Florida*, 392 U.S. 378, this Court noted that it had failed to find a single case where law enforcement officers had ever been prosecuted for blatantly violating the provisions forbidding improper wiretapping. The determination of this Court therefore was that the wiretaps must be kept out of evidence as a deterrent and that no prohibition and no sanction against the officers who violated the spirit and letter of the law could be tolerated. Thus, the Court explained in *Lee v. Florida:*

"But the decision we reached today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.' *Elkins v. United States* . . . .Under our constitution *no court, state or federal, may serve as an accomplice* in the willful transgression of 'the laws of the United States,' laws by which 'the judges in every state (are) bound. . . .'

Finally, our decision today is counseled by experience. The hope was expressed in *Schwartz v. Texas* that 'enforcement of the statutory prohibition in Sec. 605 can be achieved under the penal provisions' of the Communciations Act. 344 U.S. at 201. . . .That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of Sec. 605 since the statute was enacted. We conclude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way — by removing the incentive to disregard it.' *Elkins v. United States* . . .reversed." (Emphasis ours.)

Finally, the manner in which the surveillance was conducted was not merely recording the conversations but included listening to them and making logs of them. Therefore, we have not only a recording but an active human being, that is an agent of the Bureau of Narcotics and Dangerous Drugs, physically listening to every conversation, evaluating it, and making a log entry thereon. The fact that of only 27 conversations that were

deemed useful or at least offered, 24 of which were admitted into evidence, is cited by the prosecution as a factor that should be considered.

It is most extraordinary that the prosecution should have the temerity to suggest that merely because after conducting a massive indiscriminate invasion of privacy without the slightest regard whatsoever to state or federal law, that the retrospective determination that only 27 of 1596 tapes are to be used, that this factor alone bears consideration on the question of minimization.

POINT II

The continuing criminal enterprise charge in Count Two of the indictment of which Joseph LaCosa was convicted is unconstitutional on its face because it is so vague that it is impossible to determine what a continuing criminal enterprise actually means. The legislative history reveals that even the framers of the act held grave doubts about its constitutionality.

A continuing criminal enterprise under Section 848 of Title 21 of the United States Code, Subsection (b), is defined as follows:

> "For purposes of subsection (a) of this section a person is engaged in a continuing criminal enterprise if —
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources."

In Congressional and Administrative News, 1970 Edition, pages 4651, 4652 and 4653, there is set forth certain discussions which indicate that the congressional committees themselves were of the opinion that the statute defining and punishing continuing criminal enterprise was objectionable and probably void. For example, the discussion as follows appears (Public Law 91-513, Congressional and Administrative News, pp. 4651, 4652):

"Thus, it is seen that the Dingell amendment improved the continuing criminal activity section. All of the signers of these additional views supported the Dingell amendment as preferable to the original language. However, candor requires that it be pointed out that this section still contains serious objections, objections which also apply to the original provisions in the continuing criminal offense portion of the bill. They are as follows:

(1) The definition of what is a continuing offense is indefinite in that —

(a) *It is not at all clear what constitutes a 'continuing series of violations of this title or title III***.'*

Suppose, for instance, that six young men attending a college reside together in a cooperative boarding house. All of them have engaged in the practice of smoking marijuana cigarettes and there has been, on a day or more, free exchange between them of such forbidden drug. Each incident of giving a cigarette to another constitutes a felony.

How long must this practice continue in order to constitute a 'continuing series of violations'? Would a single day's experiment with smoking 'pot' constitute a 'continuing series of violations', or would it require a week, a month, or a year of such activities to make the offenses 'continuing?'

(b) *It is not at all clear what is meant by deriving 'substantial income or resources' from the enterprise.*

Let us take the situation mentioned above. Suppose one of the young men is the house manager of the boarding house. As such he is in a general 'supervisory position' or 'other position of management' in the ordinary affairs of the house, but he has not ordinarily obtained any 'income or resources' connected with the sale of marijuana. He has only been paid for his general house

management. On one occasion he purchases $100 worth of marijuana and divides it with the other five members, selling it to them at cost. Has he then obtained 'substantial income or resources' in connection with the enterprise?

Or what if such common purchase by one of the group is done each week? Also, does 'substantial income or resources' relate to profits or, on the other hand, to mere receipt of money? Would 'income or resources' include the advantage to the house manager of obtaining his own share of the marijuana at a cheaper rate because it was bought in bulk?

(2) The very severe penalty of the continuing criminal enterprise section (a minimum of ten years and a maximum of life imprisonment) is applicable to a broad range of criminal activities, some of which are very mild and some of which are very serious, without discrimination.

The American Bar Association in its 'Standards Relating to Sentencing Alternatives and Procedures,' approved August 1968, stated that the sentence imposed in special offender cases should not be disproportionately more severe than a maximum sentence generally provided by law for a given felony. Edward L. Wright, president of the American Bar Association, objected to the language of the special offender sentencing provisions of S. 30 because they violate such standard. (See his testimony before Subcommittee No. 5 of the House Judiciary Committee on July 23, 1970.)

The standard is even more flagrantly abused in the bill recommended by this committee. The student house manager described in the example above would have to receive at least a 10-year sentence if convicted at all. The same sentence might be received by a member of a ring of heroin peddlers operating wholly for profit. Indeed, it is conceivable in cases where long-haired students are particularly obnoxious that the student house manager — who is, say, also a black activist — would receive a life sentence. In another community a hard-working 'straight' heroin peddler, with a large family and a good lawyer, might receive the 10-year sentence.

The point is that the range of penalty, running as it does up to the life sentence, is too wide to encompass offenses which range from hardly more than student peccadillos to hardened crime. The duty of the legislative body to bracket offenses and penalties is solely for the purpose of creating uniformity and fairness as between different judges, different juries, and different parts of the country in the application of the criminal law intended to be enforced fairly and uniformly.

Since there is no field of criminal law which is more subject to abuse — subject as it is to planting evidence, framing the accused or stirring up the prejudice of the community — than that involving drug abuse, it is extremely important that we not leave the range of risk and punishment to prosecutor's discretion. Unfortunately,

prosecutor's discretion is sometimes like the discretion of the hound on the scent of the hare. It is our duty reasonably to constrain it.

(3) The mandating of a minimum penalty upon the Court presents the dilemma of —

(a) Holding a person guilty of a minor or moderate crime not guilty in order to avoid the inordinate sentence of 10 years, or

(b) Imposing a 10-year sentence upon one who is not guilty of a serious crime, not likely to be a repeater, and whose life may be ruined by the conviction."

The nature of a continuing criminal enterprise is such that it is difficult to determine precisely what is meant by the term.

A. Conspiracy and Section 848 Are Duplicative .

Joseph LaCosa was convicted of a conspiracy which by its very nature under the indictment herein was also a continuing criminal act. It would seem to be double punishment or perhaps even double jeopardy to charge a defendant with acts which are redundant and give consecutive punishment for the same act.

The vagueness is such that one does not really know what the statute seeks to punish. For example, in the statute, the legislature had declared that a continuing criminal enterprise is one where there is a violation of any

provision of this Subchapter or Subchapter II of this chapter, the punishment for which is a felony. The statute goes on to say that any such violation is a part of the continuing series of violations of this Subchapter or Subchapter II, which are undertaken by such person in concert with five or more other persons, with respect to whom such person occupies a position of organizer, supervisory position, or any other position of management and (b) from which such person obtained substantial income or resources.

We are not going to detail the foregoing legislative history which we have included in the brief. It seems apparent however that Subdivision 2 of Title 18 United States Code could also cover this language. Moreover, this seems to be virtually identical to the conspiracy charge herein wherein Joseph LaCosa is charged with acting in concert with a number of people, and for a conspiracy it matters not whether he was in a position of organizer, supervisor, or management. The fact remains that the two crimes cover the same subject matter. What this type of continuing criminal enterprise actually is, to distinguish it from the conspiracy, is impossible to determine from the statutory language and is therefore unconstitutionally vague.

Under the Sixth Amendment an accused is entitled to know the nature and cause of the accusation against him. Therefore, statutes fixing or declaring offenses must be very precise. Under this clause, that is the Sixth Amendment, it is necessary that a crime "be in some way declared by legislative power"; it "cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state." *(United States*

v. Potter, 56 F. 83, 88 (1892). See, also, *Viereck v. United States*, 318 U.S. 236 (1943) and *Kraus & Bros. v. United States*, 327 U.S. 614, 621 (1946)).

A criminal statute which is so vague that it leaves the standard of guilt to the "variant views of the different courts and juries which may be called upon to enforce it" cannot be squared with this provision. *(United States v. Cohen Grocery Co.*, 264 F. 218, 220 (1920), aff'd, 255 U.S. 81 (1921)). Thus, it was held in *United States v. Cohen Grocery Co., supra*, that a statute making it unlawful "for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" was unconstitutional because it was not "adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." (*Ibid.* 89.)

See, also, *United States v. Cardiff*, 344 U.S. 174 (1952); Cf. *Screws v. United States*, 325 U.S. 91 (1945).

Where, as in the case at bar, other statutes must be looked to determine whether or not the offense is committed, it is not sufficiently clear merely to set forth the language of the statute. While the indictment herein does allege some additional facts, it is submitted that there is not sufficient to apprise the defendant precisely of what is being charged. In any event, the statute itself is so indefinite that it cannot be construed. See *United States v. Carll*, 105 U.S. 611 (1882).

Neither the prosecutor nor the Court ever told the jury who constituted the five or more persons needed for a continuing criminal enterprise. The jurors were left to speculate on this altogether.

We maintain that there were several conspiracies, none of which involved five or more persons. For example, defendants Calvin and Grant were apparently unaware of the Marbles and Byrd. They competed for supplies if we are to believe the prosecution's testimony.

We ask the Government to set forth anywhere in the trial where they proved that Joseph LaCosa was engaged in a continuing criminal enterprise, and if so with whom!

B. Count Two of the Indictment, which is Under 21 U.S.C. Section 848, is Tantamount to a Bill of Pains and Penalties in Violation of the Bill of Attainder Provisions of the United States Constitution (Article I, Sections 9 and 10, United States Constitution).

In view of the foregoing discussion of the nebulous nature of 21 U.S.C. Section 848 and of Count 2 of the indictment itself, we submit that this statute in effect is so confusing that it is impossible to fix a standard for conviction. A judicial trial within its framework, because of this vagueness, is virtually impossible.

Under the circumstances, we maintain that the statute constitutes a violation because it is in the nature of a Bill of Pains and Penalties. We realize that the petitioner, Joseph LaCosa, had a trial in this case but we maintain that no jury could interpret Count Two or 18 U.S.C. Section 848 with sufficient clarity or understanding to actually render an intelligent verdict one way or the other. To that extent the legislature in effect has created a Bill of Pains and Penalties in violation of the Bill of Attainder section of the Constitution. See *United States v. Lovett*, 328 U.S. 303 (1946); *Cummings v. Missouri*, 4 Wall. 277 (U.S. 1867) and *Ex Parte Garland*, 4 Wall. 333 (1867).

The only purpose of the legislation here was to add an additional penalty for acts which were already covered under the conspiracy statutes and under statutes defining substantive crimes. It cannot be viewed in any light other than that of inflicting double punishment for the same act.

This case is more nearly a case of guilt by conjecture than anything else. There was an utter failure to establish a single conspiracy, let alone a continuing criminal enterprise. The fact of the matter is that several of the people with whom Joseph LaCosa dealt, were in actual competition with each other and it is difficult to understand how they therefore could have been part of a single conspiracy. (See *United States v. Vilhotti*, 452 F.2d 1186 (2 Cir. 1971); *United States v. Casalinuovo*, 350 F.2d 62 (2 Cir. 1971) and *United States v. Euphemia*, 261 F.2d 441 (2 Cir. 1958).

The parties who act in concert should not be punished a second time for entering into the very same agreement merely because it is called a continuing criminal enterprise rather than a conspiracy.

This well-reasoned rule has flourished and has been extended to cases of bribery, *Sager v. United States*, 49 F.2d 725 (2 Cir. 1931); *United States v. New York Central and Hartford Railroad Company*, 146 F.2d 298 (Cir. Ct. S.D.N.Y. 1906) and *United States v. Zeuli*, 237 F.2d 845 (2 Cir. 1943).

The rule is acknowledged by this Court although not applied in *Gebardi v. United States*, 287 U.S. 112 (1932); see also, *United States v. Katz*, 271 U.S. 354 (1926) and *United States v. Holte*, 236 U.S. 140 (1915).

Not only is there no definition of a continuing criminal enterprise, but it is completely duplicitous with the conspiracy counts and consequently Joseph LaCosa has received double punishment for the identical offenses. We do not believe the Court below adequately considered this aspect of the case.

POINT III

The searches and seizures conducted herein were predicated upon the wiretaps which were clearly in violation of the constitutional and statutory standards. Thus, the searches and seizures were likewise improper. In any event, the evidence seized should not have been introduced as against the respective defendants designated by the prosecution.

We will not dwell *in extenso* on this point since it is submitted that we have already detailed for the Court the fact that the wiretaps were unconstitutional and not in compliance with statutory standards. Since the only probable cause for the search warrants were obtained because of the wiretaps, it necessarily follows that the search warrants were predicated upon unconstitutional procedures and the articles seized should have been suppressed as fruits of the "poisonous tree" *(Nardone v. United States, supra,* and *Silverthorne Lumber Company v. United States*).

Joseph LaCosa, for example, was one of the victims of the search and seizure. Agent Siegel declared that he had been present during most of the search of 11 Daisy Court and had also been present when the return following the search and seizure was made to the state court judge.

Siegel, on direct, testified very succinctly that he had been present when the return was made and when the search was conducted. On cross-examination, however, this agent admitted that there was nothing whatsoever in certain of the exhibits, for example — "5G" — that indicated the articles belonged or were attributable to Joseph LaCosa. Yet the Court permitted most of these exhibits to go into evidence as against Joseph LaCosa.

On pages 1593 and 1594 of the trial transcript, the examination of Agent Siegel reveals, we submit, that he was clearly fabricating his testimony and that the Court should not have permitted anything to go into evidence. Moreover, we ask that this Court make a determination that the testimony of this agent was not worthy of belief.

Following is a portion of the cross-examination (T1593-94):

"BY MR. ANOLIK:

Q. Mr. Siegel, is there anything in these proposed exhibits, 5-G and the others, that indicate that they belong to Joseph LaCosa? A. No, sir.

Q. Any name of Joseph LaCosa being the owner described thereon? A. Not that I have seen; no sir.

Q. You said you were present when the return was made? A. I believe I was, sir.

Q. Who made the return? A. I don't recall.

Q. Where was it made? A. I don't recall, sir.

Q. How long ago was it made? A. Some time in March, sir.

Q. You don't remember where, even? A. No, sir.

Q. Was it made in the courtroom? A. I don't recall, sir.

Q. Was it made before a Judge? A. I don't recall, sir.

Q. Well, you are a special agent of the Bureau of Narcotics and Dangerous —

MR. FEFFER: Objection.

THE COURT: Yes. This isn't the time for argument. It is a time for voir dire only.

Q. Can you tell me in what manner it was determined that the articles in the return should be listed? A. (No response.)

Q. How were they described, in other words? A. I wouldn't know, sir. I had no control over that.

Q. You were present though, weren't you? A. I was in the approximate area; yes, sir.

Q. Did you actually witness the return being made? A. I don't recall if I did, sir."

With respect to a scale which was found in the house occupied by Frank LaCosa, Joseph LaCosa, and their respective wives and children, the Court ruled that this scale was introduced as against Frank LaCosa.

Not only was there no indication that this was the type of scale that would ordinarily be used in a narcotics case, but, moreover, there was no evidence at all that it was used by or belonged to Frank LaCosa.

It should be noted that in connection with the search of 10 Sable Court, Santo Lidestri of the State Police testified that Timothy Schrader was not even present when the officers first entered the premises but that Philip Manfredi was present (308a-322a).

Timothy Schrader later arrived at the scene of the search wherein $39,000 in cash was uncovered but he was not even placed under arrest (308a-310a).

It is extremely significant that the search warrant named Philip Manfredi alone and did not even mention Timothy Schrader.

It is submitted that the petitioner Schrader was denied a Sixth Amendment right of confrontation when the Court refused to permit his lawyer to call Investigator Crodelle concerning an important aspect of the case including, but not limited to, the search warrant (349a-351a).

The following colloquy took place (349a):

"MR. RICHMAN: I won't rest. I will request to call officer John Crodelle with respect to this warrant's execution.

THE COURT: *I won't permit it.*

MR. RICHMAN: You are depriving him of a fair and complete trial. He is entitled to go on with his case that the phone belonged to somebody else . . . . "

The Government had called Officer John Crodelle as its own witness and obviously was in a position to obtain his appearance without difficulty. The Court nevertheless denied Schrader's attorney the right to have Officer Crodelle called, even though the Assistant United States Attorney indicated that he would call the witness if necessary (351a, 352a). [7]

POINT IV

There was pervasive and highly prejudicial publicity, including reports of the killing of one of the co-defendants on the virtual eve of trial. The Trial Court erred therefore in denying a continuance.

While we submit that the foregoing Points are more than ample to warrant reversal of the convictions herein, we feel it would be remiss if we did not at least mention the fact that there was pervasive and highly prejudicial

7. Crodelle admitted the affidavit he made in support of the search warrant was more than 10 days old before the warrant was executed. This violated Section 690.30 C.P.L.

publicity at the very eve of trial concerning the killing of one of the co-defendants in the case, in the headlines of the Daily News, coupled with articles in the New York Times, the New York Post, the Rockland County Journal News, and other periodicals (T22, 33).

Among the publicity was such headlines as "TWO HOODS KILLED; FEAR DRUG WAR" (T23).

The New York Post had an article with the heading "SIX DRUG DEALERS VANISH, GANG WAR, SIX DRUG DEALERS MISSING" (Exhibit 1-A).

There were also references to Joseph Manfredi as having been a member of "organized crime" with "sensational photographs" with the captions "TWO NEPHEWS BUMPED OFF; COPS THINK MAYBE FIGHT FOR DRUG BUSINESS".

In addition, the electronic media, including television, carried stories. Counsel pointed out to the Court below that the television media had even given a complete rehash of all the gory details of murders and had discussed it in the frame of reference to the impending trial, calling it a 25 million dollar narcotics ring (T27, 28).

See *Marshall v. United States*, 360 U.S. 310; *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Ervin v. Dowd*, 366 U.S. 717 (1961) and *Sheppard v. Maxwell*, 384 U.S. 333.

See also, the American Bar Association Standards relating to fair trial and free press (Section 3.5(f)(1968)).

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioners

APPENDIX

DENIAL OF MOTION FOR REHEARING

72-2278—82 UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of January, one thousand nine hundred and seventy-four.

United States of America,

Plaintiff-Appellee,

v.

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Philip John Manfredi,, a/k/a "Little Philip", Timothy Schrader, Josephine Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Dominick Trinchera, George Del Nevo, Vincent D'Amico, Horace Marble, William Marble, Thaddeus Byrd, Melvin Calvin, Herman Grant, Robert Mayo, John Doe, a/k/a "Frank", John Roa, a/k/a "Alex", Robert Doe, a/k/a "Benny",

Defendants,

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Timothy Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Herman Grant, Robert Mayo,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant's, Frank and Joseph LaCosa, Timothy Schrader, Vincent Yanni, Charles Cassarella and Anthony Colangelo, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ IRVING R. KAUFMAN
Chief Judge

72-2278—82 UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of January, one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. JOHN F. KILKENNY,

HON. JAMES L. OAKES,
Circuit Judges

United States of America,

Plaintiff-Appellee,

v.

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Philip John Manfredi,, a/k/a "Little Philip", Timothy Schrader, Josephine Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Dominick Trinchera, George Del Nevo, Vincent D'Amico, Horace Marble, William Marble, Thaddeus Byrd, Melvin Calvin, Herman Grant, Robert Mayo, John Doe, a/k/a "Frank", John Roa, a/k/a "Alex", Robert Doe, a/k/a "Benny",

Defendants,

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Timothy Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Herman Grant, Robert Mayo,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants, Frank and Joseph LaCosa, Timothy Schrader, Vincent Yanni and Charles Cassarella, & Anthony Colangelo,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

OPINION OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 922-26—September Term, 1972.

(Argued May 24, 1973 Decided November 23, 1973.)

Docket Nos. 72-2278-82

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MANFREDI, FRANK LACOSA, JOSEPH LACOSA, VINCENT YANNI, TIMOTHY SCHRADER, CHARLES CASSARELLA, ANTHONY COLANGELO and ROBERT MAYO,

Appellants.

Before:

KAUFMAN, KILKENNY* and OAKES,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* convicting all appellants of conspiracy to distribute narcotics in violation of 26 U.S.C. §§ 4705(a) & 7237(b) and 21 U.S.C. § 846, convicting appellant Joseph LaCosa of engaging in a continuing criminal enterprise involving narcotics in violation of 21 U.S.C. § 848, and convicting appellant Joseph LaCosa of distribution of heroin in violation of 21 U.S.C. § 841.

Convictions affirmed.

* Of the Ninth Circuit Court of Appeals, sitting by designation.

LAWRENCE FEITELL, New York, N. Y., *for Appellant Manfredi.*

IRVING ANOLIK, New York, N. Y., *for Appellants Joseph LaCosa, Frank LaCosa, Schrader and Cassarella.*

LEWIS E. ALPERIN, Mount Vernon, N. Y., *for Appellants Yanni and Colangelo.*

PIERRE N. LEVAL, New York, N. Y., *for Appellant Mayo.*

JOHN M. WALKER, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Kenneth R. Feinberg and Richard J. Davis, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from convictions arising out of the operation of a large-scale narcotics ring from suburban New York and New Jersey which supplied dealers and distributors in Harlem. Questions are raised both as to the sufficiency of the evidence and as to the reception of evidence obtained from wiretapped and recorded telephone conversations. A number of the questions of law involved were also *sub judice* by another panel of this court in *United States* v. *Bynum,* 475 F.2d 832 (2d Cir. 1973). There was in that case a remand to the district court for an evidentiary hearing in respect to legality of the wiretap evidence; a decision in this case was withheld pending that evidentiary hearing and the opinion of the *Bynum* panel after remand, which has now been filed. *United States* v. *Bynum,* Nos. 72-1857, -1884, -2101, -1763, -2142, -2143 (2d Cir. Sept. 24, 1973), slip op. at 5293 *et seq.* Some of the questions,

particularly with respect to the necessity for "minimization" of the wiretaps and of what that minimization should consist were answered by the court in *Bynum* and in part on the basis thereof we affirm the judgments below.

For treatment of the issues involved here, however, we must recount the evidence specifically and in some detail recount the wiretap evidence, that is to say, the evidence obtained by use of the wiretaps and the way in which the wiretaps were conducted.

I. The Facts

A. *The evidence prior to the wiretaps.* The overall proof of the Government was to the effect that Joseph LaCosa was the most visible member of a family narcotics business[1] involved in distributing millions of dollars' worth of heroin and cocaine in the period between April, 1970, and April, 1972. His principal, if not sole, source for the heroin was, according to the Government's case, his uncle who lived in New Jersey, Joseph Manfredi, and one of his principal assistants was his cousin, the late Philip J. Manfredi. Other family members also convicted include his father, Frank LaCosa, and his cousin Timothy Schrader. All of these defendants and Vincent Yanni, Charles Cassarella

1 Joseph LaCosa, his wife, Madelyn, and his parents, Frank LaCosa and Mary Manfredi LaCosa, lived at 11 Daisey Court, Nanuet, New York. Philip J. Manfredi, now deceased, his sister, Josephine Manfredi Schrader, and her husband, Timothy Schrader, lived at 10 Sable Court, West Nyack, New York. Joseph's mother, Mary, is the sister of Joseph Manfredi whose home was 115 Kipp Avenue, Lodi, New Jersey. Philip J. Manfredi's second sister, Dianne, is married to appellant Charles Cassarella, and their home is 2262 33rd Street, Astoria, Queens. Josephine Schrader, Dianne Cassarella and Philip J. Manfredi were the children of Urbano Manfredi, a deceased brother of Joseph Manfredi and Mary LaCosa. From time to time, the evidence discloses, Joseph Manfredi drove a 1970 Thunderbird registered to Frank LaCosa but at Joseph Manfredi's New Jersey address, while Joseph LaCosa and/or Philip J. Manfredi often drove two Cadillacs registered to Timothy Schrader.

and Robert Mayo, all of whom were distributors or dealers who purchased from the LaCosa-Manfredi family, and Anthony Colangelo, a supplier of cocaine, were convicted below on Count I of an indictment alleging a conspiracy to distribute narcotics in violation of 26 U.S.C. §§ 4705(a) and 7237(b) and 21 U.S.C. § 846. Joseph LaCosa was charged under Count II of the indictment with, and convicted of, "engaging in a continuing criminal enterprise" involving narcotics in violation of 21 U.S.C. § 848 and under Count III with distribution of heroin in violation of 21 U.S.C. § 841.[2]

The Manfredi-LaCosa narcotics organization numbered among its customers Horace and William Marble, Herman Grant, Robert Roseboro, Thaddeus Byrd, and Garland Currie (now deceased), in addition to the other convicted defendants. Horace Marble, who was in partnership with Herman Grant in the heroin traffic in Harlem, met Joseph LaCosa, under the name "Joey," on April 10, 1970. Commencing with the purchase of one ounce of heroin on the following day, another ounce three days later, and then one-eighth of a kilogram, Horace Marble became a regular purchaser from Joseph LaCosa who, sometimes accom-

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2 There were 13 other original defendants. Of these, three—Horace Marble, William Marble and Thaddeus Byrd—were severed prior to trial, pleaded guilty, and testified for the Government against the appellants here. Three others were severed on the Government's motion. Five others could not be arrested. Philip J. Manfredi was murdered prior to trial. Herman Grant was convicted with appellants but murdered following the filing of his notice of appeal. Joseph Manfredi was sentenced as a second narcotics offender to 30 years' imprisonment and a $25,000 commuted fine. Joseph LaCosa was sentenced to 15 years' imprisonment on Counts I and III and 30 years' imprisonment on Count II with the prison terms to run concurrently and a $100,000 commuted fine. Frank LaCosa was sentenced to 10 years' imprisonment and a $15,000 fine, Vincent Yanni to eight years' imprisonment, Charles Cassarella to six years' imprisonment, Anthony Colangelo to 10 years' imprisonment, Robert Mayo to nine years' imprisonment, and Timothy Schrader to seven years' imprisonment.

panied by Philip J. Manfredi, personally delivered the heroin to Marble until October of 1971 when Marble was arrested. Marble alone purchased between one and two kilograms of heroin per week at prices of $23,500 for one kilogram and $46,000 for two kilograms from the summer of 1970 to October of 1971. Most of the deliveries took place at Third Avenue and 76th or 86th Street in New York after a telephone call from LaCosa to Marble, with payment being made for the preceding shipment each time. William Marble, who was involved in his brother's distribution organization, sometimes received the telephone calls from LaCosa and relayed messages to his brother or occasionally himself picked up heroin from LaCosa or Philip J. Manfredi, including some smaller amounts for his own use. While it is nothing new perhaps to the avid readers of Second Circuit opinions, it might be mentioned that a purchaser such as Horace Marble with his 20-person heroin milling and distribution organization was engaged in an operation so widespread that each of the 17 or so sellers in the group supplied about 50 addicts with heroin. Each kilogram of heroin purchased from LaCosa produced about 600 "bundles," each bundle consisting of 25 "bags," the "bags" in turn each selling for five dollars on the street, so that the street value of each kilogram was about $75,000. Joseph LaCosa, who was not one to hide his light under the proverbial basket, identified his heroin connection to Horace Marble as his uncle, who LaCosa said was "big and in organized crime," adding that his uncle picked up the heroin from the trunk of a car in New Jersey. LaCosa also told Horace Marble that he had another customer in the District of Columbia who purchased four kilograms of heroin per week, so that Marble was only his second biggest customer. Marble once totaled the bills he received from LaCosa for heroin delivered to him as close to one million dollars.

In the latter part of 1970 Joseph LaCosa, who apparently had access to more narcotics than Horace Marble and his Washington, D. C., customer could buy, asked Horace to locate additional dealers for him. Marble introduced him to Robert Roseboro, who testified for the Government. Roseboro had his own heroin milling operation and purchased half-kilogram packages on a bi-weekly basis with deliveries made at the Gracie Square Hospital where Roseboro was on methadone maintenance. On December 15, 1970, Roseboro delivered a half-kilogram of heroin obtained from LaCosa to Agent White of the Bureau of Narcotics and Dangerous Drugs (BNDD) and was then arrested and agreed to cooperate with the Government. After his arrest he met LaCosa while under surveillance and at these meetings LaCosa bragged about his new Cadillac and his new swimming pool and agreed to meet a "customer" from Detroit. Roseboro in turn agreed to pay LaCosa $3,000 which he owed him at his (Roseboro's) apartment. At the apartment LaCosa told Roseboro that his own uncle was his boss and that his uncle's name was "Joe." The purchaser from Detroit, who was a Government agent, put $12,700 in the glove compartment of a rented car and, with Roseboro, met LaCosa at Second Avenue and 70th Street. LaCosa took the car to First Avenue and 84th Street where he abandoned it and joined Philip J. Manfredi in a Cadillac registered to Timothy Schrader. As the Cadillac moved uptown, LaCosa was observed showing a quantity of money to the driver but LaCosa did not return with the heroin as planned. He later told Horace Marble that he believed (quite correctly) that he was being followed by the police. Through Marble, the half-kilogram of heroin was delivered by LaCosa to the Government agent.

Moving to the spring of 1971, Thaddeus Byrd, a gas station attendant, was a drug courier for and in the gypsy taxi business with one Garland Currie, a narcotics dealer

and another one of Joseph LaCosa's customers. Byrd, with Currie, met LaCosa, identified as "Duke," and subsequently picked up heroin from and delivered money to him on Currie's behalf, generally at 80th Street and Lexington Avenue. LaCosa instructed Byrd to use the code word "shirt" for heroin in telephone conversations—just as he had done in transactions with Roseboro. Byrd discussed narcotics over the telephone with LaCosa and, working for Currie, often bought up to two kilograms of heroin in a series of purchases. Byrd was stopped on October 17, 1971, by Agent White of the BNDD after he had delivered money to LaCosa for Currie. Currie died before Byrd saw him again, but Currie's partner, Fred Powell, continued in the business, with Byrd purchasing narcotics twice more from LaCosa.

B. *The wiretap evidence and accompanying surveillance.* On the basis of affidavits by the Rockland County District Attorney, Robert Meehan, State Investigator John Crodelle, and BNDD Agent Frank White, telephonic interception was requested on a 24-hour-a-day basis at the LaCosa home at 11 Daisey Court, Nanuet, New York, and the Manfredi-Schrader home at 10 Sable Court, West Nyack, New York.[3] The affidavit of Crodelle specifically stated: "Your deponent recognized that not all the conversations occurring over the subject telephones will pertain to the said narcotics violations, and accordingly your deponent agrees to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations." Justice Sweeney of the New York State Supreme Court issued warrants commencing on September 17, 1971,

3 The telephone at 11 Daisey Court was listed in the name of Frank LaCosa and at 10 Sable Court in the name of Timothy Schrader.

for wiretaps on both phones permitting law enforcement authorities "to intercept, eavesdrop, listen to and make copies of conversations . . . concerning penal law violations pertaining to the crimes of criminally selling a dangerous drug in the first degree, criminal possession of a dangerous drug in the first degree, and conspiracy to commit violation of the aforesaid sections of law." There was an extension of these orders to November 14, 1971.[4] Surveillance was continuous with monitoring agents of the BNDD taking eight-hour shifts, the only exception being when the Daisey Court LaCosa instrument was out of order between September 30, 1971, and October 20, 1971. During this period every conversation was listened to and recorded. Brief notes on the content of the conversations were made in log books maintained by the monitoring agents. Transcription summaries of conversations were then prepared from the tapes; calls thought to be "non-pertinent" were described only briefly in these transcript summaries. Calls thought by the transcribing agents to be pertinent—some shrouded in the code language recounted above and below—were more fully summarized in the transcript sheets. Verbatim transcriptions were prepared of conversations which were obviously pertinent to the case under investigation.

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4 This extension was obtained under the provisions of N.Y.C.P.L. § 700.40 (McKinney 1971) [hereinafter cited as CPL].

The original order permitting intereception ran for 30 days beginning September 17 but was extended for 30 more days on October 15, 1971, upon the renewal affidavit of Investigator Crodelle and the renewal application of District Attorney Meehan. On November 23, 1971, Justice Sweeney ordered the postponement of notice to the owners of the two instruments and the sealing of the intercepted recordings after receiving returns as to both instruments from District Attorney Meehan. Meehan notified both Frank LaCosa and Timothy Schrader of interceptions on May 31, 1972.

Twenty-seven conversations were offered in evidence and 24 were admitted.[5] Shortly after installation of the interception device at 11 Daisey Court on September 17, 1971, at 5:03 p.m., appellant Cassarella ordered double what he got "the last time" from Joseph LaCosa with delivery to be that night. Seven minutes later "Benny" spoke with

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5 For trial purposes, the Government selected 27 conversations intercepted from the instruments at 11 Daisey Court and 10 Sable Court. Of these, 24 were admitted into evidence at the trial, which are listed below. All of the conversations in evidence except two were intercepted in the period September 17, 1971, to October 5, 1971.

No.	*Date*	*Time*	*Instrument*	*Participants*
1	9/17	5:03 p.m.	Daisey Ct.	Cassarella/J. LaCosa
2	9/17	5:10 p.m.	Daisey Ct.	F. LaCosa/"Benny"
3	9/20	9:35 a.m.	Sable Ct.	Vinnie/Philip Manfredi
6	9/20	3:27 p.m.	Sable Ct.	Vinnie/Philip Manfredi
7	9/20	3:34 p.m.	Sable Ct.	J. LaCosa/unidentified male
8	9/20	5:20 p.m.	Sable Ct.	Vinnie/Philip Manfredi
9	9/20	5:30 p.m.	Daisey Ct.	J. LaCosa/Mrs. Marble
10	9/20	7:45 p.m. 9:40 p.m.	Sable Ct.	"Roe"/Josephine Schrader
11	9/21	11:15 a.m.	Daisey Ct.	Timothy Schrader
13	9/23	7:47 p.m.	Daisey Ct.	"Frankie"/J. LaCosa
14	9/24	8:00 p.m.	Daisey Ct.	Yanni/J. LaCosa
15	9/26	2:38 p.m.	Daisey Ct.	J. LaCosa/T. Byrd
16	9/26	8:10 p.m.	Daisey Ct.	Yanni/J. LaCosa
17	9/27	4:55 p.m.	Daisey Ct.	J. LaCosa/"Butch"
18	9/27	6:52 p.m.	Daisey Ct.	J. LaCosa/Wm. Marble
19	9/28	6:55 p.m.	Daisey Ct.	Yanni/J. LaCosa
20	9/28	8:00 p.m.	Daisey Ct.	Unidentified male/J. LaCosa
21	9/28	8:20 p.m.	Daisey Ct.	Yanni/J. LaCosa
22	9/28	2:55 p.m.	Daisey Ct.	J. LaCosa/T. Byrd
23	9/29	2:56 p.m.	Daisey Ct.	J. LaCosa/T. Byrd
24	9/29	6:10 p.m.	Sable Ct.	J. LaCosa/Wm. Marble
25	9/29	9:35 p.m.	Daisey Ct.	Yanni/J. LaCosa
26	10/28	8:25 p.m.	Sable Ct.	Cassarella/Philip Manfredi
27	11/ 6	5:40 p.m.	Sable Ct.	"Tony Cole"/J. LaCosa

Frank LaCosa and arranged for a delivery the following week, Frank assuring him that, if he got the money on one day, the "stuff" would be available the next day, or "if it's early enough you can have it the same night. . . ." Three days later at 9:35 a.m. "Vinnie" called Philip J. Manfredi at 10 Sable Court, and at 3:27 p.m. ordered "two shirts" from Philip which the latter agreed to deliver at 7:00 p.m. After a further conversation at 5:20 p.m. between Vinnie's man "Alex" and Philip J. Manfredi it was agreed that delivery would be at the "frankfurter place" on Third Avenue and 86th Street where the Marble deliveries were generally made. Following that call, Agent White observed Philip J. Manfredi leave 10 Sable Court at 6:10 p.m., enter the Schrader Cadillac and drive to Third Avenue and 86th Street in Manhattan where at 7:10 p.m. he got out of the car. Shortly after that he was arrested. Later that evening Philip's sister, Josephine, discussed the arrest over the telephone at 10 Sable Court with "Roe," stating that Philip had a "quarter" on him and advising "Roe" to "clean up" her house. Following Philip J. Manfredi's arraignment on September 21, Timothy Schrader phoned from the courthouse to Joseph LaCosa at 11 Daisey Court and instructed him to "take the money and put it in a suitcase" and to take "the guns" to his aunt's house "to be safe." On September 23, 1971, at 7:47 p.m., "Frankie" called Joseph LaCosa at 11 Daisey Court and after some preliminary conversation pertaining plainly to Philip's arrest three days before asked him if he had seen his "friend" the other night, by which it may be inferred he meant his connection for narcotics. LaCosa replied that his friend had told him to "go over there tomorrow afternoon." Frankie told him to "let me know . . . . [C]ause ah desperation sitting here." La Cosa did in fact go to his uncle's house the following day, September 24, 1971, and left

it at 6:00 p.m. whereupon he drove back to 11 Daisey Court, Nanuet, his own house. There, at 8:00 p.m. on the evening of the 24th, he received a phone call from appellant "Butch" Yanni who, again after some preliminary talk about Philip's arrest, asked him "if we can do anything." LaCosa replied that he "missed the guy tonight" and that he "just missed him by five minutes." Yanni indicated that he might go to "the guy in the Bronx" (another supplier) but that he didn't want any "hard feelings" on LaCosa's part. Two days later at 8:10 p.m. Yanni again telephoned Joseph LaCosa to find out "what's happening?" and was told to wait until "tomorrow" when he would be seeing "him" (his connection) at "two or three o'clock in the afternoon." The next day, September 27, 1971, Joseph LaCosa left 11 Daisey Court at 1:15 p.m. and drove to Joseph Manfredi's house at 115 Kipp Avenue, where he arrived 45 minutes later. The surveillance agent, White, passed the house and saw Joseph Manfredi standing in the driveway. White then followed LaCosa toward the New Jersey side of the George Washington Bridge, whereupon LaCosa, going 85 to 100 miles per hour, lost the agent, who was only doing 75 to 80. The agent, however, went to LaCosa's residence at 11 Daisey Court and saw him drive a 1971 Cadillac back into his garage at 4:30 p.m. Twenty-five minutes later Joseph LaCosa telephoned Yanni and scheduled a meeting for 11:00 p.m. that night. He later telephoned William Marble also to arrange a meeting and shortly after midnight that night the surveilling agents observed a series of half a dozen cars, including the proverbial late-model Cadillacs and Lincolns, enter the LaCosa garage at 11 Daisey Court at ten-minute intervals, each car staying in the garage for five minutes or so and then leaving the area. A jury might assume that they were not arriving for purposes of oil changes or motor repairs.

On September 28, 1971, the following day, at 6:55 p.m. Yanni called Joseph LaCosa and confirmed a meeting at 9:00 p.m. that night and asked if he could get an "extra shirt or two" to which Joseph LaCosa replied, "By tomorrow." At 8:00 p.m. Joseph LaCosa received a call from an unidentified male telling him to wait "if I am a little late." At 8:20 p.m. Yanni called and asked "how long it will be before you get another shirt down." LaCosa replied "the next day or even tomorrow night," whereupon Yanni explained " 'Cause he asked me for four more." They agreed to meet the following night. On September 29 at 9:35 p.m. Yanni telephoned Joseph LaCosa to tell him that he was waiting for "that guy" and invited LaCosa to drop by late that night for the money. LaCosa agreed to meet Yanni the following day and said that "the four shirts" were definite. In the light of the non-wiretap testimony from the Marbles, Byrd and Roseboro, a jury might have assumed that these calls did not have to do with men's furnishings.

Earlier on September 29, LaCosa had called Thaddeus Byrd setting up a meeting for that night and complaining that Byrd's last payment of $20,000 was short by $1,000; LaCosa also called William Marble asking for Horace Marble and arranging for a pickup of $1,300 that night from William.

On September 30, 1971, Agent White followed Joseph LaCosa to Yanni's house in New City, New York, where he arrived at 12:30 a.m., that is, later the night of the 29th; photographs in evidence showed LaCosa entering and leaving the house.

At 8:00 p.m. on October 28, Agent White observed Charles Cassarella enter his residence in Queens. Twenty-five minutes later Cassarella called Philip J. Manfredi at 10 Sable Court to ask Philip whether LaCosa would "do that thing for me or not," complaining that "these guys

keep bothering me every day." Philip's reply was "Don't worry, we'll let you know, all right?"

On November 6, 1971, at 5:40 p.m. Joseph LaCosa placed a telephone call to appellant Anthony Colangelo. Colangelo insisted on a meeting at 7:45 p.m. that evening to deliver a "pair of pants" which is a commonly used narcotics code word for cocaine. LaCosa agreed and Colangelo told him to bring the price of one pair of pants.

C. *Additional evidence.* On March 14, 1972, searches were conducted pursuant to warrants at the LaCosa home at 11 Daisey Court, the Manfredi-Schrader home at 10 Sable Court, and the Yanni home at New City, New York. Much additional evidence was obtained. This evidence included slips of paper bearing references to the defendants on trial and substantial numerical figures identified by Horace Marble as similar to bills of account he received from Joseph LaCosa; an address book bearing names and telephone numbers of the conspirators Grant, Marble, Mayo and Byrd at the home of the Schraders; $39,764 in cash in Timothy Schrader's bedroom; and other miscellaneous items. Three days later, with the use of the address book, Agent Siegel called various telephone numbers found in it. One was that of Herman Grant with whom Siegel as "Joey LaCosa's cousin Dominick" arranged to deliver a "couple of shirts." In return for the "shirts" he received $18,000, following which Grant was arrested. Agent Siegel also called Anthony Colangelo with the use of the LaCosa address book with the same story. Colangelo asked the price, to which Siegel replied $12,000. Colangelo said he wasn't sure and didn't know whether he would take them. At that point a telephone next to Siegel rang loudly in the BNDD headquarters. Colangelo stated that he didn't know anyone by the name of Joey LaCosa and that Siegel must have the wrong party and hung up. Siegel also called Robert Mayo with the same story. Mayo "agreed to take

them," that is to say, the shirts, and Mayo said he didn't owe LaCosa any money and that they should meet at the "usual place" which he defined as 126th Street and Fifth Avenue. Mayo did not show up, so Siegel telephoned him again and Mayo subsequently said he couldn't handle the shirts.

On April 30, 1972, Agent White arrested Joseph Manfredi and, after proper warnings, on the way to New York Manfredi stated to White that he thought that the Bureau of Narcotics was going to place him under arrest at the time that Philip J. Manfredi had been arrested in September, 1971. In addition a summary of telephone records was stipulated into evidence which indicated among other things that in the first four months of 1971 there were 64 calls from the Daisey Court telephone to a telephone in the name of Diane Marble, that is to say, her husband, Horace, and in 11 days' time in August and September of 1971, 12 calls from that number to Robert Mayo, four calls from the Nanuet number to Tony Colangelo between November 8, 1971, and November 11, 1971, and 40 calls from Anthony Colangelo to the Nanuet number between October 29, 1971, and November 8, 1971.

II. Sufficiency of the Evidence

A. *Joseph LaCosa.* There was ample evidence in the testimony of Horace and William Marble, Robert Roseboro and Thaddeus Byrd, independent of the wiretaps, to show that Joseph LaCosa was selling heroin and cocaine in a continuing series of weekly transactions with several distributors, the primary product pushed being heroin. To Horace Marble alone he sold an estimated one million dollars' worth in 17 months.

B. *Joseph Manfredi.* There was sufficient circumstantial evidence independent of hearsay declarations from which Manfredi's participation in the conspiracy could be in-

ferred. In *United States* v. *Calabro,* 449 F.2d 885, 889-90 (2d Cir. 1971), *cert. denied,* 405 U.S. 928 (1972), presence of the defendant with a codefendant when the codefendant was engaged in a criminal enterprise, coupled with the defendant's "patting down" an undercover agent, was held to be sufficient independent evidence to permit an inference of the defendant's having associated himself with the criminal venture. *See also United States* v. *Geaney,* 417 F.2d 1116, 1120-21 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). This independent evidence may be completely circumstantial. *Cf. United States* v. *Cassino,* 467 F.2d 610, 618 n.21 (2d Cir. 1972), *cert. denied,* 410 U.S. 928 (1973). By actual surveillance Joseph LaCosa was seen to try to meet his uncle at the times he told his customers he was going to meet his "friend." After he did meet his uncle on one occasion he eluded Agent White on the return to his home and that same night there was a series of visits to his garage that can fairly be described as clandestine. The calls by Joseph LaCosa to his distributors do not implicate Manfredi as such, but they do shed light on LaCosa's conduct which in turn is circumstantial proof that Manfredi was supplying him with heroin. *See United States* v. *Ruiz,* 477 F.2d 918 (2d Cir. 1973); *United States* v. *Pacelli,* 470 F.2d 67, 69-70 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973); *United States* v. *Calabro, supra.* There was, then, sufficient independent evidence to establish Manfredi's participation in the conspiracy to warrant introduction of hearsay statements against him. *Glasser* v. *United States,* 315 U.S. 60, 74 (1942). These statements by Joseph LaCosa to Horace Marble and Robert Roseboro, recounted in the recital of facts above, established Manfredi as the supplier of heroin to LaCosa, thereby confirming the circumstantial evidence related above. They were made in the

furtherance of the conspiracy, since LaCosa was obviously trying to impress his customers with the importance, connections, wealth and power of his uncle in order to build sound "customer relations." They have a ring of reliability for this very reason. There is no requirement that the trial judge must find, before admitting a coconspirator's declaration, that it is neither "crucial" to the Government's case nor "devastating" to the defense. *United States* v. *Puco*, 476 F.2d 1099, *on petition for rehearing*, 476 F.2d 1106, 1107 (2d Cir. 1973). Even if there were such a requirement, the hearsay declarations here were neither more "crucial" nor more "devastating" than the declarations in *Puco* itself. *United States* v. *Puco*, 476 F.2d at 1103-05.

C. *Frank LaCosa, Timothy Schrader, Charles Cassarella and Robert Mayo.* Appellants Yanni and Colangelo do not contest the sufficiency of the evidence against them. Frank LaCosa's house was used for the operation of the narcotics business, his garage was used as a delivery point, his Lincoln was used by his son Joseph for deliveries; more importantly perhaps his telephone conversation with "Benny" on September 17, 1971, implicates him clearly—he could deliver the "stuff" the day following receipt of the money or if it's early enough in the day "you can have it the same night . . . this way they don't think that they're getting cheated." Shrader's house, telephone and cars were used by Joseph LaCosa and Philip J. Manfredi to arrange narcotics transactions and handle deliveries; his telephone call from the courthouse and treasure trove of nearly $40,000 in cash permit the inference of participation and reward in the conspiracy. Cassarella's calls were more guarded, perhaps, even than the others, but were in "narcotics code," requesting "double" what he got "the last time," inquiring whether Joey was "going to do that for

me or not," and in an obvious reference to his own customers, complaining that "these guys keep bothering me every day." Robert Mayo, who was in Joseph LaCosa's address book, was a customer of the ring; Mayo was willing to do business with Agent Siegel masquerading on the telephone as "Joey's cousin Dominick," the business being the taking of "a couple of shirts" and at the "usual place"; that he had done a considerable amount of business was indicated by the numerous calls from 11 Daisey Court to Mayo at the end of August, 1971.

III. The Wiretap Questions

We omit reference to the question of constitutionality of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, since *United States* v. *Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied* 42 U.S.L.W. 3181 (U.S. Oct. 9, 1973), and *United States* v. *Bynum, supra*, slip op. at 5309, have dealt with that issue adversely to appellants, noting that the very issue is before the Supreme Court in *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411 U.S. 905 (1973).

The principal attacks made on the wiretapping here are (1) an omission in both the original and renewal warrant orders to require "minimization" under state law, CPL § 700.30, and (2) an alleged failure to minimize the interception of innocent conversation on the two telephones tapped, contrary to state law, CPL § 700.30, and federal law, 18 U.S.C. § 2518(5).[6]

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6 Under § 700.30 of the CPL, the warrant must contain:

1. The name of the applicant, date of issuance, and the subscription and title of the issuing justice; and

2. The identity of the person, if known, whose communications are to be intercepted; and

3. The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and

In dealing with the question of the validity of the warrants themselves, clearly a question of state law,[7] it will be recalled that the Crodelle affidavit submitted to the state

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4. A particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates; and

5. The identity of the law enforcement agency authorized to intercept the communications; and

6. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained; and

7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; and

8. An express authorization to make secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant.

18 U.S.C. § 2518(5) reads in pertinent part as follows:

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . .

7 While we encourage cooperation between federal and state law enforcement agencies, we note that the Government, in allowing a joint investigation to proceed through the use of a state warrant, subjects itself to the risk that state courts may impose on such warrants and the evidence obtained under those warrants a higher standard than would a federal court dealing with interpretation of the federal wiretap statutes. *Cf. California* v. *Jones*, 30 Cal. App. 3d 852, *appeal dismissed*, 42 U.S.L.W. 3175 (U.S. Oct. 9, 1973).

court judge in support of the petition seeking the wiretap order contained an agreement "to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations."

Neither the original nor renewal warrant orders, however, contained any directive to this effect. CPL § 700.30 specifically says that "An eavesdropping warrant must contain: . . . 7. A provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article. . . ." New York state judges have construed this requirement in different ways, Justice McGrover in *People* v. *Solomon*, 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973), holding that omission of that specific directive was "nothing more than a 'de minimis' oversight," which would not vitiate an eavesdropping order, while Judge Werken in *People* v. *Kennedy*, 347 N.Y.S.2d 327 (Greene Cty. Ct. 1973), held a wiretap order fatally defective for failure to comply with the 700.30 requirement. *Compare People* v. *Sher*, 329 N.Y.S.2d 2 (Greene Cty. Ct. 1972), *with People* v. *Heuston*, 347 N.Y.S.2d 78 (App. Div. 1973) (3-2 decision) (re notice), *and People* v. *Palozzi*, 346 N.Y.S.2d 595 (Monroe Cty. Ct. 1973). No New York case, however, involves reliance in the order upon supporting affidavits which contain an agreement to "minimize." In this case we feel free to analogize from *United States* v. *Tortorello*, 480 F.2d at 781, which, while it apparently did not consider the matter as controlled by state law, held that a New York state judge's authorization order was sufficient to establish probable cause on the basis of facts alleged in the supporting affidavits. We feel it proper to read both the orders themselves and the minimization language of the supporting affidavits in "a commonsense and realistic fashion." *See United States* v. *Ventresca*, 380 U.S. 102, 108 (1965) (probable cause); *United States* v. *Desist*,

384 F.2d 889 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969). We read CPL 700.30(7) also as a summation of the more specific requirements of 700.30(1)-(6), all of which lead to "minimization." So reading the state statute and the orders and affidavits, we do not find the orders vitiated by virtue of omission of the talismanic minimization language.

We turn now to the more difficult question whether, in this case, the eavesdropping was conducted so "as to minimize the interception of communications not otherwise subject to eavesdropping" under CPL § 700.30(7). This question is, like that of the facial validity of the warrant, one to be determined by reference to state law. Assessment of the minimization question necessarily ultimately depends upon the facts and circumstances of each case.

As previously stated, *see* text following note 4 *supra*, all calls incoming or outgoing over the two telephones involved were monitored and recorded irrespective of the identity of the parties engaged in the conversations. After the transcription of the conversations was accomplished in either summary or verbatim fashion, the tapes themselves were kept under lock and key. The court has examined both the monitor logs and the transcription sheets with some care in order to appreciate more fully the claims made by both the defendants and the Government with respect to minimization.

Our examination of state court decisions construing and applying CPL § 700.30(7) leads us to conclude that none of them is either dispositive or particularly indicative of how the New York courts would rule on the facts before us. The New York Court of Appeals has yet to consider this question. In *People* v. *Holder*, 331 N.Y.S 2d at 569-71, the two defendants were under indictment for conspiracy to cause the felonious death of a third party. In this quite simple conspiracy, the fact that fewer than 10

per cent of the conversations recorded were relevant to the conspiracy appears to have been determinative of the court's decision to suppress. In *People* v. *Castania,* 340 N.Y.S.2d 829, 833-36 (Monroe Cty. Ct. 1973), the court was faced with a gambling conspiracy more complex than the conspiracy in *Holder* but which cannot be equated with the conspiracy before this court. In *Castania* the court took account of the fact that only slightly over one-half of the conversations had been monitored, which, coupled with the court's assumption that non-pertinent calls could have been recognized as such and not intercepted, dictated a finding that minimization had not been achieved. It is precisely that assumption made by the *Castania* court which cannot be made in this case. In *People* v. *Kennedy,* defendants were under indictment for *possession* of dangerous drugs and associated paraphernalia. The court, in dicta, indicated its disapproval of a practice under which only 10 per cent of the calls recorded were actually monitored, thereby virtually negating the possibility of minimizing the interception of calls.

These state cases, since they do not deal with complex, far-flung narcotics conspiracies, are not dispositive of the case before us. We feel free, in these circumstances, to consider the question of minimization under the language of 18 U.S.C. § 2518(5) and decisions thereunder, noting that the language of CPL § 700.30(7) virtually tracks that of the federal statute. We also note that in considering the question of minimization, the *Holder* court, 331 N.Y.S. 2d at 571, and the *Castania* court, 340 N.Y.S.2d at 836, both appear to incorporate by reference lower federal court decisions addressed to this question.

We are aided by the trial court's finding that the law enforcement agents here made a "good faith effort to minimize to the extent practical and electronically possible,

within the peculiar circumstances of a narcotics conspiracy —which is one of the most difficult things to surveil and obtain evidence on that I can think of in modern law enforcement . . . ." We held in *Bynum*, slip op. at 5310, that "the mere fact that every conversation is monitored does not necessarily render the surveillance violative of the minimization requirement of the statute." What Judge Tyler was talking about here was doubtless that in a narcotics conspiracy the use of code words and cover-up jargon and methods of dealing make investigation most difficult. Here, as in *Bynum*, "it is . . . obvious that no electronic surveillance can be so conducted that innocent conversation can be totally eliminated." *Id.* at 5310. Here there was testimony that "most" of the 1,595 calls intercepted were deemed to be "germane" to the narcotics investigation. In all candor, our examination of the logs and transcription sheets does not lend credit to that testimony.[8] At the same time, here, as in *Bynum*, the conspiracy unveiled was a huge business involving millions of dollars' worth of narcotics, numerous distributors and highly complex, surreptitious telephone calls, with numerous callers, male and female, both in and out of the surveilled homes, occupied by persons at least one of who was openly claiming to be connected with organized crime in the operation of the business. We too fail to see how any detailed screening instructions which could effectively minimize licit telephone interceptions could be devised under these circumstances. Here no claim is made that the Government could have formulated a pattern of innocent calls by which it could have

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8 For example, the court's examination of the Sable court transcript sheets revealed that over 800 of the more than 1,000 calls placed during the period in question were either designated as "non-pertinent" by the transcriber(s) or were calls to which there was either no answer or a busy signal. Only 150 or so calls were designated to be of possible interest.

avoided intercepting those. Here no claim is made that any privileged calls were intercepted.[9]

Calls dealing with the narcotics conspiracy were made at all hours of the day or night, so that no minimization by non-use in certain time periods could be attempted. In the sampling of about 100 calls listened to by Agent White, he heard "very few"—indeed he did not remember hearing any—that did not relate to drugs or the proceeds obtained from drugs. Morover, it is perfectly clear from the record that some seemingly innocuous calls were in fact related to the drug conspiracy; evidentiary significance could be ascertained only by comparison with other conversations involving the same persons or in the light of facts ascertained either independent of or as a result of the conversation. Finally, it was obvious that the purpose of the wiretaps was not simply to obtain evidence against the telephone subscribers but rather to ascertain the scope and extent of the drug conspiracy under investigation. Given all these facts, we believe that the Government made a prima facie showing of compliance with the minimization provision, and we have the trial court's finding of good faith, in monitoring all the calls from the two key numbers.

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9 Section 2510(4) defines "intercept" to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device." Section 2518(8)(a) requires that "[t]he contents of any wire or oral communication intercepted . . . shall, if possible, be recorded on tape or wire or other comparable device." The recordings in turn must be kept under seal until authorized to be opened by court order. In this case, all conversations recorded were also monitored, so, as in *Bynum*, slip op. at 5314 & n.6, we need not reach the question whether the statute was intended to apply solely either to aural intrusion or mechanical recordation. Indeed, were all the calls not recorded, ingenious counsel might be claiming that exculpatory conversations or conversations that would place seemingly inculpatory conversations in context were omitted and *Brady* v. *Maryland* would be invoked. We also see no reason why, upon proper application by affected parties, subject to order of the court to which returns on the authorizing warrants were made, so-called "non-pertinent" calls could not be erased from the tapes.

While it may be that, as Judge Miller said in *United States* v. *Focarile,* 340 F. Supp. 1033, 1047 (D. Md. 1972), *aff'd sub nom. United States* v. *Giordano, supra,* "[s]ection 2518(5) ... requires the intercept procedure to be conducted so as to reduce to the smallest possible number the interception of 'innocent' calls," in this instance the burden clearly shifted to the defendants to make some showing as to how this could be done. They make no suggestion even now. Here, as in *Bynum,* there was no way to frame screening instructions so as to accomplish any non-recording of "innocent" calls. Indeed, were all the calls not monitored, ingenious counsel would be claiming that exculpatory conversations or those which would place other conversations in context were omitted and *Brady* v. *Maryland* would be invoked. We do not believe that the statute goes further than to require that the methods used to effect minimization be in good faith and reasonable. *Cf. Berger* v. *New York,* 388 U.S. 41, 53 (1967), and *Katz* v. *United States,* 389 U.S. 347, 355 (1967). It thus becomes unnecessary for us to determine whether a failure adequately to minimize requires suppression of all the conversations overheard, *United States* v. *Focarile,* 340 F. Supp. at 1047; *United States* v. *Scott,* 331 F. Supp. 233 (D.D.C. 1971), or only nonincriminating conversations. *United States* v. *Cox,* 462 F.2d 1293, 1301-02 (8th Cir. 1972); *United States* v. *King,* 355 F. Supp. 523, 543-44 (S.D. Cal. 1971).

We see no reason why, upon proper application by affected parties, subject to order of the court to which returns on the authorizing warrants were made, so-called "non-pertinent" calls could not be erased from the tapes.

While appellants do not challenge the wiretaps on the basis of lack of probable cause, certain appellants argue that the application for the wiretap orders must be made by the district attorney in person appearing before the judge. While under CPL § 700.05(5) the "applicant" has

to be a district attorney or the attorney general, and under 18 U.S.C. § 2516(2) the applicant must be the "principal prosecuting attorney" of any state or political subdivision thereof, this court held in *United States* v. *Tortorello, supra,* that the requirement of former § 794 of the CPL (now § 690.35, omitting the very language discussed in *Tortorello*) that "[t]he person seeking the warrant shall appear personally before the judge . . ." related only to the law enforcement officers with personal knowledge who signed the supporting affidavits. Not only does *Tortorello* seem to us to make good sense, but the appellants fail to point to any language in the New York statutes in effect at the time of the issuance of the warrants here that would require any such personal appearance even of the law enforcement officers.

The argument that only the district attorney's staff and the state police were authorized to monitor the wiretaps, but in fact federal narcotics agents did so, thus subjecting the wiretaps to attack under 18 U.S.C. § 2518(10)(a)(iii), is without substance. This was at all times a joint investigation, as found by Judge Tyler, and the Rockland County District Attorney specifically relied on BNDD Agent White's affidavit in his application for the original authorizing warrant. It is beyond dispute that, whether decided as a matter of federal or state law, both statutory schemes specifically allow for the disclosure of evidence gained from an authorized wiretap by those authorized to appropriate law enforcement officials not mentioned in the wiretap order. The federal provision, 18 U.S.C. § 2517, and the New York state provision, CPL 700.65, both contemplate the type of cooperation among law enforcement officials which occurred in this case. *See United States* v. *Forlano,* 358 F. Supp. 56, 59 (S.D.N.Y. 1973). If such information may be exchanged after the termination of the surveil-

lance, we perceive no reason why that information may not be disclosed to cooperating agencies contemporaneously with its interception.

Finally, appellants argue that the postponement of notice of the surveillance to those persons named in the warrants until on or about June 3, 1972, some six months after the termination of the surveillance, was violative of 18 U.S.C. § 2518(8)(d) and CPL § 700.50(3), (4). No state cases having been brought to our attention on this point, we think that the proper perspective for viewing this question is correctly stated by the Third Circuit:

> If, in a given case, there is undue delay [in giving notice], that contention may be pressed in an appropriate averment alleging non-compliance with the statute. The vice of unreasonable delay is a factor to be measured within the contours of the statute, and should not be used to shape those contours into an unconstitutional form. Simply stated, the Congressional mandate places a premium on reasonable notice of the inventory. . . . [C]ourts should exercise great care in granting extensions beyond the ninety-day period for the filing of inventories.

United States v. *Cafero*, 473 F.2d 489, 500, *petition for cert. filed*, 42 U.S.L.W. 3018 (U.S. Mar. 26, 1973) (No. 72-1304). Given the complexity of the investigation that continued up until the moment that notice was given in this case, we are extremely reluctant to disturb Judge Tyler's determination below that the postponement authorized by Justice Sweeney was reasonable under all the circumstances. It may be that this holding stretches the interpretation of the statutory provisions to constitutional limits, but if so, we note that none of the appellants have made or attempted to make any showing of prejudice to them as a result of the delay here.

IV. Constitutionality of 21 U.S.C. § 848

Appellant Joseph LaCosa's conviction under Count II of the indictment was for "engaging in a continuing criminal enterprise" under 21 U.S.C. § 848(b),[10] and resulted in a 30-year sentence and $100,000 fine thereunder. He argues that the statute is void for vagueness. *See, e.g., Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939) (disorderly person); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972) (vagrancy). While it may be true, as the Government argues, that only very infrequently has a *federal* statute been declared unconstitutional on vagueness grounds, *e.g., United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81 (1921), this does not answer the basic question whether 21 U.S.C. § 848(b) is constitutionally vague. As Mr. Justice Douglas noted in *Papachristou,* however,

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10 21 U.S.C. § 848:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

. . . .

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

. . . .

"In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." 405 U.S. at 162. In this respect § 848 is in a very real sense a regulation—a very severe one, to be sure—of the business of selling drugs. To constitute a "continuing criminal enterprise" there must be a felonious violation of the chapter which is a part of a "continuing series of violations" of Title II or Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513 (Oct. 27, 1970), 84 Stat. 1242, 21 U.S.C. § 801 *et seq.* & 951 *et seq.* In addition, the violator must have been acting "in concert with five or more persons" and as to them occupy "a position of organizer, a supervisory position, or any other position of management." Beyond this the violator, or person charged under § 848, must obtain "substantial income or resources" from the enterprise. Section 848 then goes to the business of trafficking in the prohibited drugs on a continuing, serious, widespread, supervisory and substantial basis. The conduct reached is only that which the violator knows is wrongful and contrary to law. *See Screws* v. *United States*, 325 U.S. 91, 102 (1945) ("But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law"). Prerequisite to conviction under § 848 is the commission of a series of felonies, each involving specific intent; that LaCosa did not suspect that his conduct was criminal and violative of law would be risible. *See also United States* v. *Ragen*, 314 U.S. 513, 524 (1942) (income tax evasion—element of bad faith avoids indefiniteness question in deducting of more than "reasonable" allowance for salaries). *Cf. Hygrade Provision Co.* v. *Sherman*

266 U.S. 497 (1925); *Omaechevarria* v. *Idaho,* 246 U.S. 343 (1918).

There is no doubt whatsoever that LaCosa was charged and tried for conducting what must be one of the biggest operations in hard drugs in the New York area; here, as in *Williams* v. *United States,* 341 U.S. 97, 104 (1951), it "strains at technicalities to say that any issue of vagueness . . . as construed and applied is present in the case." *See also United States* v. *Petrillo,* 332 U.S. 1, 7 (1947). That is to say, it is irrelevant that a case may be hypothesized where it is difficult to determine whether a particular defendant were engaged in a "continuing criminal enterprise" under § 848. This serves to distinguish this case from cases like *United States* v. *Singleton,* 460 F.2d 1148 (2d Cir. 1972), *cert. denied,* 410 U.S. 984 (1973), in which a statute penalizing "organized criminal activity" without further definition was, despite doubts from the dissenter, upheld. Here, as in *Petrillo,* the statute might have been more artfully drawn, but no language has occurred or has been suggested to us that better expresses the congressional purpose. To sustain appellant LaCosa's position would force us to hold that words cannot be devised to make it an offense to engage in the continuous sale and trafficking in heroin with a number of other people and with substantial sums of money changing hands; we feel that not to be the case and that, as applied to the conduct with which Joseph LaCosa was charged, *see Broadrick* v. *Oklahoma,* —— U.S. —— (1973), the statute is not unconstitutionally vague. *United States* v. *Collier,* 358 F. Supp. 1351 (E.D. Mich. 1973).

V. Pretrial Publicity

Approximately two weeks prior to the commencement of this trial, two nephews of Joseph Manfredi—Philip J. Man-

fredi, who had previously been charged in the indictment under which this case was brought, and Philip D. Manfredi —were executed in a vacant lot in Bronx County. The various media gave these executions extensive coverage. In the headlines of several New York newspapers 10 to 12 days *before* the trial there appeared such items as "Two Hoods Killed; Fear Drug War" and "Six Drug Dealers Vanish, Gang War, Six Drug Dealers Missing." There also appeared references to appellant Joseph Manfredi as a member of "organized crime" and a caption under a photo "Two Nephews Bumped Off; Cops Think Maybe Fight for Drug Business." Apparently television referred to a "$25 million narcotics ring." The trial court refused to grant a continuance and conducted a voir dire, inquiring of the jurors whether they had heard either on the radio or television or read any newspaper or printed account of "anything having to do with this case." Only one of the jurors replied affirmatively, but she could not recall what she read; one other juror thought he might have read something, but wasn't sure. The appellants argue that reference to Philip J. Manfredi's name, coupled with his absence from the trial and references to certain locations in the Bronx, "very likely supplied the catalyst for association by jurors" with what had been earlier disseminated by the media. It is the failure of the trial court to grant a continuance in view of the pre-trial publicity that is said to constitute prejudicial error, and it is argued that this case is one of such extreme "inherently prejudicial publicity" that the actual existence of prejudice in the jury box need not be shown. *Cf. Hale* v. *United States*, 435 F.2d 737, 746 (5th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971).

But the publicity here did not deal with the issue of guilt or innocence in the case itself. *United States* v. *Persico*, 425 F.2d 1375, 1380 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States ex rel. Gallo* v. *New York State*

Department of Correctional Services, 335 F. Supp. 915, 918 (S.D.N.Y. 1972). Moreover, the voir dire—which seems to have been conducted fairly—disclosed no recall of the 10-day-old stories. *See United States* v. *Dioguardi,* 428 F.2d 1033, 1039 (2 Cir.), *cert. denied,* 400 U.S. 825 (1970); *United States* v. *Agueci,* 310 F.2d 817 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963); *United States ex rel. Gallo* v. *New York State Department of Correctional Services, supra.* In times of fast-moving news events of all kinds one really cannot be surprised at what appears to be a short memory on the part of the public generally or the cross-section of it included on a given jury panel. Appellants' sense of their own importance in their analogizing this case to the Watergate is greater than this court's. We do not believe, in short, that the trial court's "broad discretion," *United States* v. *Persico,* 425 F.2d at 1382, in this area of prejudice from pretrial publicity was here abused by the denial of the continuance. We point out that this is not a case of *in-trial* publicity like *Marshall* v. *United States,* 360 U.S. 310 (1959), or *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). *See also United States* v. *Palmieri,* 456 F.2d 9, 13-14 (2d Cir.), *cert. denied,* 406 U.S. 945 (1972).

Judgment affirmed.

ORDER OF AFFIRMANCE

(Dated November 23, 1973)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23 day of November, one thousand nine hundred and seventy-three.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. JOHN F. KILKENNY,

HON. JAMES L. OAKES,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Philip John Manfredi,, a/k/a "Little Philip", Timothy Schrader, Josephine Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Dominick Trinchera, George Del Nevo, Vincent D'Amico, Horace Marble, William Marble, Thaddeus Byrd, Melvin Calvin, Herman Grant, Robert Mayo, John Doe, a/k/a "Frank", John Roa, a/k/a "Alex", Robert Doe, a/k/a "Benny",

Defendants,

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Timothy Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Herman Grant, Robert Mayo,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk